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TREATMENT OF OIL SHALE MINING CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES
DEVELOPMENT AND PRODUCTION

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 30

TO PROVIDE FOR CERTAIN REQUIREMENTS RELATING TO THE CONVERSION OF OIL SHALE MINING CLAIMS LOCATED UNDER THE GENERAL MINING LAW OF 1872 TO LEASES, AND FOR OTHER PURPOSES

H.R. 2392

TO AMEND SECTION 37 OF THE MINERAL LEASING ACT RELATING TO OIL SHALE CLAIMS, AND FOR OTHER PURPOSES

JULY 31, 1989

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Committee on Energy and Natural Resources

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TREATMENT OF OIL SHALE MINING CLAIMS

MONDAY, JULY 31, 1989

U.S. Senate,
Subcommittee on Mineral Resources
Development and Production,
Committee on Energy and Natural Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:04 a.m., in room SD-366, Dirksen Senate Office Building, Hon. Jeff Bingaman presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Senator Bingaman. Good morning. This is a hearing of the Mineral Resources Development and Production Subcommittee. The purpose of the hearing is to take testimony on S. 30 and H.R. 2392. These are two bills dealing with the treatment of oil-shale mining claims located on Federal land.

As I have indicated to the witnesses, I am forced to leave about 9:30, but Senator Wirth has agreed to chair the remainder of the hearing and I, of course, thank him for that.

There are currently 1,600 oil-shale claims covering 253,000 acres in Colorado, Wyoming, and Utah. These claims were located pursuant to the Mining Law of 1972 prior to 1920 when the passage of the Mineral Leasing Act made oil shale a leasable mineral, but grandfathered valid claims existing at the time of passage.

S. 30, which was introduced by Senator Wirth on January 25, would prohibit the issuance of most oil-shale patents after the date of introduction of the bill. It also requires the remaining claim holders to elect to either convert the claim to a lease under modified provisions of the Mineral Leasing Act or to maintain the claim pursuant to certain requirements. H.R. 2392 provides for the same general approach as S. 30.

These oil shale mining claims have been mired in controversy for decades and remain so today. Currently Secretary Lujan has stated that the Department of the Interior will not issue any patents during this calendar year, and he has stated that he will review the issue.

I would like to commend Senator Wirth for his diligent efforts in seeking an equitable solution to the difficult issue.

I would also like to welcome the witnesses today and look forward to the testimony. I would ask that witnesses try to summarize their remarks in 5 minutes or so.

[The prepared statements of Senators McClure and Wallop, and the texts of S. 30 and H.R. 2392 follow:]

STATEMENT OF SENATOR MCCLURE

HEARING ON S. 30 AND H.R. 2392

MONDAY, JULY 31, 1989

SINCE ENACTMENT OF THE MINERAL LEASING ACT IN 1920, THERE HAVE BEEN A WEALTH OF CONFLICTING ADMINISTRATIVE, JUDICIAL AND CONGRESSIONAL DECISIONS AND INSTRUCTIONS WITH RESPECT TO OIL SHALE CLAIMS WHICH WERE GRANDFATHERED UNDER THAT ACT. MOST RECENTLY, SECRETARY LUJAN HAS ESTABLISHED AN ADMINISTRATIVE PROHIBITION ON THE ISSUANCE OF OIL SHALE PATENTS THROUGH CALENDAR YEAR 1989. FRANKLY, I AM CONCERNED THAT THE RIGHTS OF CLAIMHOLDERS, PARTICULARLY THOSE WHO HAVE FILED PATENT APPLICATIONS, ARE BEING VIOLATED BY THIS MORATORIUM AND THOSE WHICH THE CONGRESS HAS IMPOSED IN RECENT YEARS. THOUGH I AM QUITE AWARE OF THE CONTROVERSY ASSOCIATED WITH THESE CLAIMS, IT IS MY VIEW THAT THE DEPARTMENT OF THE INTERIOR HAS A RESPONSIBILITY TO CARRY OUT THE LAW AS IT HAS BEEN INTERPRETED BY THE COURTS.

THIS MORNING'S HEARING FOCUSES ON TWO MEASURES, S. 30 AND H.R. 2392, WHICH ADDRESS THESE UNPATENTED OIL SHALE CLAIMS. IN THIS SENATOR'S VIEW, BOTH PIECES OF LEGISLATION FALL FAR SHORT OF RESOLVING THE ISSUES ASSOCIATED WITH THESE CLAIMS IN A FAIR AND EQUITABLE MANNER. HOWEVER, I BELIEVE IT MAY BE POSSIBLE TO FASHION A COMPROMISE LEGISLATIVE PROPOSAL WHICH WILL SERVE TO END THE CONTROVERSY OVER THESE CLAIMS, AND NOT JUST INVITE FURTHER LITIGATION. I AM AWARE OF THE EFFORTS OF THE OIL SHALE LANDS CLAIMS COMMITTEE, A GROUP MADE UP OF VOLUNTEERS REPRESENTING DIVERGENT VIEWS ON THE OIL SHALE ISSUE, WHICH

HAS MET SEVERAL TIMES IN COLORADO TO TRY TO CRAFT SUCH A COMPROMISE PROPOSAL. I COMMEND THOSE WHO HAVE BEEN PARTICIPATING IN THAT GROUP FOR ESTABLISHING A DIALOGUE WITH ONE ANOTHER AND FOR WORKING TO FIND A REASONABLE RESOLUTION TO THE OIL SHALE ISSUE.

WITH RESPECT TO S. 30 AND H.R. 2392, I HAVE A NUMBER OF SPECIFIC CONCERNS. FIRST, BOTH MEASURES FOREVER PROHIBIT CLAIMHOLDERS WHO HAD NOT MET ALL REQUIREMENTS FOR A PATENT PRIOR TO THE DATE OF INTRODUCTION OF THE LEGISLATION FROM PATENTING THEIR CLAIMS UNDER THE TERMS OF THE 1872 MINING LAW -- THE LAW UNDER WHICH THEY WERE LOCATED. I FEEL VERY STRONGLY THAT A WINDOW SHOULD BE PROVIDED WHICH WOULD PRESERVE THE RIGHT OF A CLAIMHOLDER TO COME FORWARD AND SEEK A PATENT FOR A LIMITED TIME AFTER ENACTMENT OF THE LEGISLATION.

I AM ALSO EXTREMELY CONCERNED ABOUT THE INCREASED ANNUAL ASSESSMENT REQUIREMENTS PRESCRIBED IN BOTH MEASURES FOR THOSE CLAIMANTS WHO ELECT TO MAINTAIN THEIR CLAIMS. THEY ARE EXCESSIVE AND UNREASONABLE. TO ADD INSULT TO INJURY, H.R. 2392 ALSO PROVIDES THAT CLAIMS WHICH HAVE BEEN MAINTAINED THROUGH EXPENDITURE OF THE REQUIRED $5000 PER YEAR ASSESSMENT WORK, WILL TERMINATE 100 YEARS AFTER THEIR LOCATION UNLESS THEY ARE COMMERCIALLY PRODUCING OIL SHALE BY THAT DATE. IF, FOR INSTANCE, A CLAIM WAS LOCATED IN 1917 AND THE CLAIM HOLDER ELECTS TO MAINTAIN THE CLAIM UNDER THE PROVISIONS OF THE HOUSE MEASURE, HE RISKS LOSING THE CLAIM IN 28 YEARS (2017) AFTER EXPENDING A MINIMUM OF $140,000. PERHAPS WE SHOULD NOT BE SO ALARMED ABOUT THE TERMINATION PROVISION, HOWEVER, SINCE THE $5000 REQUIREMENT IS SO PROHIBITIVE THAT

MOST, IF NOT ALL, CLAIMANTS WOULD BE FORCED TO RELINQUISH THEIR CLAIMS LONG BEFORE THE SECRETARY WOULD CANCEL THEM DUE TO LACK OF COMMERCIAL PRODUCTION. UNFORTUNATELY, I BELIEVE THAT THIS IS THE UNSTATED GOAL OF THE HOUSE-PASSED LEGISLATION.

I AM ALSO CONCERNED ABOUT THE $2000 PER ACRE FEE CONTAINED IN H.R. 2392 WHICH WOULD BE REQUIRED OF CLAIMHOLDERS ELIGIBLE TO APPLY FOR A LIMITED PATENT ON THEIR CLAIMS (OIL SHALE AND ASSOCIATED MINERALS ONLY). THIS AMOUNT IS AN INSULT TO THOSE CLAIMANTS WHO HAVE IN GOOD FAITH PARTICIPATED IN DISCUSSIONS ON COMPROMISE LEGISLATION AND HAVE AGREED TO GIVE UP THEIR RIGHT TO PATENT THE SURFACE AND OTHER RESOURCES ASSOCIATED WITH THEIR CLAIMS. THEIR CONCESSION OF SURFACE RESOURCES SHOULD SEND A STRONG MESSAGE TO THOSE WHO CONTINUE TO ACCUSE OIL SHALE CLAIMANTS OF ASPIRING TO CREATE SKI RESORTS OUT OF LANDS THEY ACQUIRE FOR $2.50 PER ACRE.

FINALLY, S. 30 CONTAINS A PARTICULARLY DISTURBING PROVISION WHICH PROHIBITS HOLDERS OF OIL SHALE CLAIMS FROM OBTAINING ANY OTHER FEDERAL MINERAL LEASES. THIS IS VERY OFFENSIVE IN LIGHT OF THE BILL'S $1000 ANNUAL ASSESSMENT REQUIREMENT WHICH THESE CLAIMANTS MUST COMPLY WITH IN ORDER TO CONTINUE TO HOLD THE CLAIMS.

IN CLOSING, I WELCOME THE GOOD FAITH EFFORTS OF THOSE INVOLVED IN THE OIL SHALE ISSUE TO COME UP WITH COMPROMISE LEGISLATION WHICH WILL BE EQUITABLE TO ALL CONCERNED. IN MY VIEW, NEITHER S. 30 OR H.R. 2392 REPRESENTS SUCH A REASONABLE COMPROMISE.

Malcolm Wallop

STATEMENT OF SENATOR WALLOP
GIVEN AT
THE HEARING ON S. 30 AND H.R. 2392
31 JULY 1989

MR. CHAIRMAN, FOR A VARIETY OF REASONS, I STRONGLY OPPOSE THE TWO PIECES OF LEGISLATION BEFORE US TODAY.

THE BILLS CONSTITUTE A LEGISLATIVE TAKING

PRIMARY AMONG THOSE REASONS IS THAT THESE BILLS LEGISLATIVELY TAKE VALUABLE PROPERTY RIGHTS FROM AMERICAN CITIZENS WITHOUT ANY COMPENSATION.

I FIND IT IRONIC THAT THERE WAS A POINT IN TIME WHEN THE GOVERNMENT WAS DOING ALL IT COULD TO GET AMERICA'S LAND INTO PRIVATE HANDS. FEDERAL LAWS, SUCH AS THE HOMESTEAD ACT OF 1862 AND THE GENERAL MINING LAW OF 1872, ENCOURAGED SETTLEMENT AND DEVELOPMENT OF THE WEST.

NOW, THE FEDERAL GOVERNMENT IS DOING ALL IT CAN TO TAKE BACK THOSE LANDS. WITH PROPOSALS SUCH AS S. 30 AND H.R. 2392, THE CONGRESS IS NOT ONLY TAKING PROPERTY RIGHTS, BUT IT IS RENEGING ON PROMISES MADE OVER A CENTURY AGO.

UNFORTUNATELY, THE GOVERNMENT HAS AN ENORMOUS APPETITE FOR TAKING PROPERTY RIGHTS, BUT LITTLE STOMACH FOR PAYING FOR THEM. FIFTY-EIGHT MILLION DOLLARS WAS AWARDED BY FEDERAL COURTS OVER A TWO YEAR PERIOD TO SATISFY JUST COMPENSATION CLAIMS UNDER THE FIFTH AMENDMENT. PENDING COURT CLAIMS CURRENTLY TOTAL UPWARDS OF $1 BILLION.

IF EITHER OF THESE BILLS WAS ENACTED INTO LAW, THE PENDING CLAIMS AGAINST THE GOVERNMENT WOULD SKYROCKET. BY FORCING SOME CLAIMANTS TO GIVE UP THEIR POSSESSORY TITLE TO THE LANDS COVERED BY THE CLAIMS, H.R. 2392 WOULD LEGISLATE AN UNCOMPENSATED TAKING OF PRIVATE PROPERTY RIGHTS. IF H.R. 2392 BECAME THE LAW OF THE LAND, THOSE OIL SHALE CLAIMANTS WHO HAVE NOT YET FILED PATENT APPLICATIONS WOULD HAVE NO CHOICE BUT TO SEEK PAYMENT IN THE FEDERAL CLAIMS COURT.

LIKEWISE, S. 30 WOULD LEGISLATE AN UNCOMPENSATED TAKING FOR THOSE WHO HAVE NOT YET FILED PATENT APPLICATIONS. BEYOND THAT, HOWEVER, S. 30 ALSO WOULD WORK AN UNCOMPENSATED TAKING FOR THOSE CLAIMANTS WHO HAVE FILED BUT NOT COMPLETED ALL THE REQUIREMENTS FOR ISSUANCE OF A PATENT. BUREAUCRATIC DELAY PREVENTED THOSE CLAIMANTS FROM COMPLETING THEIR PATENT APPLICATIONS. AS A RESULT, AND THROUGH NO FAULT OF THEIR OWN, S. 30 WILL EFFECTIVELY LOCK THEM OUT OF LANDS TO WHICH THEY WERE ENTITLED BEFORE IMPOSITION OF THE ARBITRARY CUT-OFF DATE OF 25 JANUARY 1989.

WYOMING CLAIMHOLDERS LOSE THEIR RIGHTS

IN WYOMING, WE HAVE 340 OIL SHALE CLAIMS COVERING 54,400 ACRES. UNDER EITHER BILL, ALL WYOMING CLAIMANTS WOULD HAVE THEIR RIGHTS TAKEN WITHOUT JUST COMPENSATION BECAUSE, AS YET, NO PATENT APPLICATIONS HAVE BEEN FILED. BESIDES LOSING PROPERTY RIGHTS, WYOMING CLAIMANTS WOULD BE FORCED TO MAKE AN ELECTION BETWEEN EITHER TAKING A LEASE OR MAINTAINING THE CLAIM AT TEN OR FIFTY TIMES THE COST.

THE BILLS FORCE CLAIMANTS TO ABANDON THEIR CLAIMS

THAT'S RIGHT, TEN OR FIFTY TIMES THE COST. UNDER THE SCHEME ESTABLISHED BY S. 30, THOSE WHO HAVE NOT COMPLETED, OR FILED, PATENT APPLICATIONS BY THE ARBITRARY DATE OF 25 JANUARY 1989 MUST ELECT TO TAKE A LEASE AND PAY A ROYALTY OF 12 1/2 PER CENT, OR MAINTAIN THE CLAIM PURSUANT TO A REQUIREMENT TO PERFORM **$1000 WORTH OF LABOR** EACH YEAR, VERSUS $100 A YEAR AT PRESENT.

UNDER H.R. 2392, THE CLAIMANT WHO HAS YET TO FILE FACES THE SAME ELECTION. IF THE CLAIMANT ELECTS TO MAINTAIN THE CLAIM, HE MUST PERFORM **"DILIGENT DEVELOPMENT" EQUAL TO $5,000 PER YEAR** PER CLAIM. WHAT'S EVEN WORSE, THE **CLAIM WILL REVERT TO THE FEDERAL GOVERNMENT AFTER 100 YEARS** FROM THE DATE OF LOCATION. FOR MOST CLAIMANTS, THAT MEANS THEY WILL LOSE ALL RIGHTS TO THEIR CLAIM AROUND THE YEAR 2015, EVEN THOUGH THEY HAVE INVESTED $150,000!

THE TRUE INTENT OF THESE PROVISIONS, AS WELL AS THE JACKED UP PATENTING FEE CONTAINED IN H.R. 2392, IS TO COERCE THE CLAIMANTS TO ABANDON THEIR CLAIMS. NONE OF THE INDIVIDUALS WHO HOLD CLAIMS CAN AFFORD THESE EXORBITANT FEES.

THIS TRUE INTENT IS CONFIRMED BY ANOTHER PROVISION IN S. 30, WHICH PREVENTS **ANY** ENTITY HOLDING AN OIL SHALE CLAIM FROM OBTAINING **ANY** OTHER TYPE OF LEASE UNDER THE MINERAL LEASING ACT. OBVIOUSLY, CLAIMANTS ARE GOING TO ABANDON THEIR CURRENTLY UNDEVELOPABLE OIL SHALE CLAIMS IN FAVOR OF DEVELOPABLE LEASES ON COAL OR OIL AND GAS.

THE BILLS ARE NOT REVENUE RAISERS

PROPONENTS OF THE BILLS JUSTIFY THEM AS "REVENUE RAISERS." THEY ESTIMATE THAT PURCHASES OF THE LIMITED PATENTS WILL GENERATE ABOUT $50 MILLION, AND THAT THE DILIGENT DEVELOPMENT FEE WILL GENERATE ABOUT $6 MILLION PER YEAR. AS I SAID BEFORE, NO REVENUES WILL BE RAISED BECAUSE CLAIMANTS WILL ABANDON THEIR CLAIMS. WHAT THE PROPONENTS ALSO FAIL TO CONSIDER IS THAT THE BILLS WILL CREATE A FLOOD OF LITIGATION REQUIRING HUGE EXPENDITURES BY THE JUSTICE DEPARTMENT TO DEFEND AGAINST THE JUST COMPENSATION CLAIMS.

THE BILLS REPRESENT A SUBTLE ATTACK ON THE 1872 MINING LAW

FINALLY, BY INCREASING THE ANNUAL WORK REQUIREMENT AND THE PATENT FEE, THE BILLS INDIRECTLY AMEND THE 1872 MINING LAW. EVEN WORSE, ENACTMENT OF EITHER BILL WOULD CONSTITUTE A BAD PRECEDENT TO BE CITED WHEN DIRECTLY CONSIDERING REFORM OR REPEAL OF THE 1872 MINING LAW.

MR. CHAIRMAN, OURS HAS ALWAYS BEEN A GOVERNMENT OF THE PEOPLE, NOT A GOVERNMENT ON THE PEOPLE, AND PRIVATE PROPERTY CANNOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION. THIS IS NOT JUST ANOTHER OLD SAW, IT IS PART OF THE CONSTITUTION. THE AUTHORS OF THE FIFTH AMENDMENT WOULD CERTAINLY BE DISMAYED AT WHAT S. 30 AND H.R. 2392 WOULD DO TO PRIVATE PROPERTY RIGHTS.

THANK YOU.

101st CONGRESS
1st Session

S. 30

To provide for certain requirements relating to the conversion of oil shale mining claims located under the General Mining Law of 1872 to leases, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 25 (legislative day, January 3), 1989

Mr. Wirth (for himself, Mr. Johnston, and Mr. Bumpers) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

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A BILL

To provide for certain requirements relating to the conversion of oil shale mining claims located under the General Mining Law of 1872 to leases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Oil Shale Mining Claims Conversion Act".

Sec. 2. Notwithstanding any other provision of law, with respect to any oil shale mining claim located prior to enactment of the Mineral Leasing Act of 1920 (30 U.S.C. 181, et seq.; 41 Stat. 437), no patent for such claim shall be issued after January 25, 1989, except for those claims for which a patent application had been filed and all requirements for a patent had been fully complied with by such date.

SEC. 3. (a) The owner of any valid oil shale mining claim located pursuant to the General Mining Law of 1872, as amended (30 U.S.C. 22, et seq.; 17 Stat. 91) prior to enactment of the Mineral Leasing Act of 1920 shall make an election under subsection (b) or subsection (c) of this section. The election shall be made within one hundred and eighty days after the enactment of this Act. Failure to make an election within such period shall be deemed conclusively to constitute an abandonment of the oil shale claim. Not later than thirty days after the enactment of this subsection, the Secretary shall notify the owner of each such claim of the election required under this subsection.

(b) The holder of a claim required to make an election under this section may elect to convert such claim to a lease. Such lease shall be issued within sixty days after any such election and administered in accordance with those provisions of the Mineral Leasing Act, as amended, applicable to leases for deposits of oil shale, except as follows:

(1) The term of the lease shall be for twenty years and for so long thereafter as shale oil is produced annually in commercial quantities from the lease;

(2) the acreage limitations contained in section 21(a) (30 U.S.C. 241(a)) shall not apply;

(3) the first and second provisos of section 21(a) shall not apply;

(4) the limitation on the number of leases to be granted to any one person, association, or corporation contained in section 21(a) shall not apply; and

(5) the royalty shall be not less than 12½ per centum in amount or value of production removed or sold from the lease.

(c) The holder of a claim required to make an election under this section may elect to maintain the claim by complying with the mining laws of the United States and with the provisions of this Act, including the following:

(1) Notwithstanding any other provision of law, commencing with the date of enactment of this provision, on each claim $1,000 worth of labor shall be performed or improvements made during each and every year. The failure to fulfill this requirement each and every year shall be deemed conclusively to constitute an abandonment of the oil shale mining claim.

(2) Notwithstanding any other provision of law, in addition to the requirements set forth in section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744; 90 Stat. 2769), the owner of an unpatented oil shale mining claim shall file annually in the office of the Bureau of Land Management designat-

ed by the Secretary of the Interior an affidavit of assessment work performed thereon. The failure to file the affidavit shall be deemed conclusively to constitute an abandonment of the oil shale mining claim.

SEC. 4. The Mineral Leasing Act, as amended (30 U.S.C. 181 et seq.; 41 Stat. 437) is amended by inserting after section 44, the following new section:

"SEC. 45. PROHIBITION ON LEASE ISSUANCE.

"The Secretary shall not issue, or approve the assignment of, a lease or leases under the terms of this Act to any person, association, corporation, or any subsidiary, affiliate, or person controlled by or under common control with such person, association, or corporation, where any such entity holds an oil shale mining claim located under the General Mining Law of 1872 (30 U.S.C. 22, et seq.; 17 Stat. 91).".

SEC. 5. In addition to other applicable requirements, any person who holds a lease pursuant to subsection 3(b) of this Act or who maintains an oil shale mining claim pursuant to subsection 3(c) of this Act shall be required to reclaim the site subject to such lease or claim and to post a bond before disturbance of the site to guarantee such reclamation. Any person who holds a lease issued or readjusted pursuant to section 21 of the Mineral Lands Leasing Act of 1920 after the date of enactment of this Act shall also be subject to such requirements. The Secretary of the Interior shall promulgate such regulations as may be necessary to implement this section.

101ST CONGRESS
1ST SESSION

H. R. 2392

IN THE SENATE OF THE UNITED STATES

JUNE 8 (legislative day, JANUARY 3), 1989

Received; read twice and referred to the Committee on Energy and Natural Resources

AN ACT

To amend section 37 of the Mineral Leasing Act relating to oil shale claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

The Congress finds that:

(1) Certain oil shale mining claims were located pursuant to the General Mining Act of May 10, 1872, before enactment of the Mineral Leasing Act of February 25, 1920, which provides for the leasing of that mineral.

(2) Section 37 of the Mineral Leasing Act permitted oil shale claims that were "maintained in compliance with the laws under which initiated" to be perfected under such laws.

(3) The holders of those oil shale claims that have not been patented have been afforded ample opportunity to apply for patents over the last 69 years but have failed to take such action.

(4) Both the Mining Act of 1872 and the Mineral Leasing Act were intended to accomplish the development of the mineral resources of the Nation, including oil shale.

(5) Almost none of the oil shale claims have been developed for their oil shale in the intervening 69 years.

(6) The continued existence of these oil shale claims restricts the lands from the development of other minerals which may exist on the claimed lands.

(7) The continued existence of these oil shale claims interferes with the effective management of Federal lands.

(8) Issuing patents at this time for claims for which a right to patent has not vested would likely result in non-mineral development contrary to the

intent of the Mining Act of 1872 and the Mineral Leasing Act.

(9) The lands embraced in an unpatented claim remain subject to the disposing power of the Congress until all conditions imposed by law for issuance of a patent are fully satisfied.

(10) Either the conversion of valid oil shale claims to leases or requiring diligent work toward production on such claims, together with the cancellation of invalid claims, would promote mineral development including for oil shale.

(11) It is in the public interest for these claims to be brought to some final resolution so that Federal lands affected may be properly managed for their mineral and other values in accordance with the laws and policies of the United States.

SEC. 2. AMENDMENT TO THE MINERAL LEASING ACT.

Section 37 of the Mineral Leasing Act (30 U.S.C. 193) is amended by inserting "(a)" before the first sentence and by adding the following new subsections at the end thereof:

"(b)(1) The Secretary of the Interior shall undertake an expedited program to determine the validity of all unpatented oil shale claims referred to in subsection (a). The expedited program shall include an examination of all unpatented oil shale claims, including those for which a patent application has not been filed. If a claim is determined to be invalid, the Secretary shall promptly declare the claim to be null and void and cancel it.

"(2) Not later than 30 days after the enactment of this subsection the Secretary shall publish proposed regulations in the Federal Register containing standards and criteria for determining the validity of all unpatented oil shale claims referred to in subsection (a). Final regulations shall be promulgated within 180 days after the date such proposed regulations are published. The Secretary shall make a determination with respect to the validity of each such claim within 2 years after the promulgation of such final regulations. In making such determinations the Secretary shall give priority to those claims which meet the requirements of paragraphs (1) and (2) of subsection (c) and subsection (f).

"(c) Except as provided in subsection (f), after January 24, 1989, no patent shall be issued by the United States for any oil shale claim referred to in subsection (a) unless the Secretary of the Interior determines that, for the claim concerned—

"(1) a patent application was filed with the Secretary on or before January 24, 1989, and

"(2) all requirements established under sections 2329, 2330, 2331, 2333 of the Revised Statutes (30

U.S.C. 35, 36, and 37) were fully complied with by that date.

"(d)(1) The holder of each oil shale claim for which no patent may be issued by reason of subsection (c) shall make an election under paragraph (2) or paragraph (3) of this subsection. Not later than 30 days after the enactment of this subsection, the Secretary shall notify the holder of each such claim of the requirement to make such election. The holder shall make the election by certified mail within 60 days after receiving such notification. Failure to make an election within such period, shall be deemed conclusively to constitute a forfeiture of the claim and the claim shall be null and void.

"(2) The holder of a claim required to make an election under this subsection may elect to apply to the Secretary for a lease under section 21. The Secretary shall promptly provide a lease application to any claimholder who makes such election and the claimholder shall file an application for lease within 90 days after receiving such application. Upon receiving such an application the Secretary shall issue a lease to the holder of such claim for the area covered by the claim if the claim is determined to be valid. A lease under this paragraph shall be issued in accordance with the provisions of section 21 except as follows:

"(A) The term of the lease shall be 20 years and for so long thereafter as oil shale or associated minerals are produced annually in commercial quantities from the lease.

"(B) The acreage limitations contained in section 21(a) shall not apply.

"(C) The first and second provisos of section 21(a) shall not apply.

"(D) The limitation on the number of leases to be granted to any one person, association, or corporation contained in section 21(a) shall not apply.

"(E) The phrase 'oil shale and gilsonite' in the first sentence of section 21(a) shall be construed to include oil shale and all other associated minerals.

"(3)(A) The holder of a claim making an election under this subsection may elect to maintain the claim by complying with such requirements as the Secretary shall prescribe, by rule, to assure that, during each year that oil shale or associated minerals are not being produced from the claim in commercial quantities, the holder of such claim either makes payments in lieu of diligent development under subparagaph (B) or expends an amount annually which—

"(i) represents diligent efforts toward the production of oil shale or associated minerals (or both),

"(ii) includes substantial work on the claim, and

"(iii) represents not less than $5,000 worth of expenditure on the claim.

"(B) In lieu of making the expenditure described in clauses (i), (ii), and (iii) in any year, the holder of such claim may pay the Secretary an amount equal to $5,000 for the claim for that year. Moneys received by the Secretary under this subparagraph shall be disposed of in the same manner as moneys received pursuant to section 35, except that 50 percent of such moneys shall be transferred to the States and 50 percent shall be deposited in the General Fund of the Treasury.

"(C) The Secretary shall promulgate a final rule under this paragraph within 90 days after the enactment of this subsection. The annual expenditure requirement under such rule shall take effect on the first day of the first month of September which occurs more than 90 days after the enactment of this subsection.

"(D) The Secretary shall review the expenditures made for each such claim not less frequently than annually.

"(E) In applying the provisions of section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744), the holder of a claim for which an election under this paragraph has been made shall comply with the provisions of subsection (a)(1) thereof only by filing (as provided in such provisions) an affidavit that the annual expenditure (or annual payments in lieu of diligent development) requirements of this paragraph have been met with respect to such claim or that oil shale or associated minerals are being produced from the claim in commercial quantities.

"(F) Failure to comply with the requirements of this paragraph and the requirements of such section 314(a)(1) shall be deemed conclusively to constitute a forfeiture of the claim and the claim shall be null and void. In addition, the Secretary shall declare a claim to be null and void and cancel it on the earlier of the following:

"(i) The date on which the Secretary determines that oil shale and associated minerals are exhausted.

"(ii) The date 100 years after the date of location of the claim.

On the date referred to in clause (ii), the Secretary shall make a determination under this subparagraph and if the Secretary determines that oil shale or associated minerals are being produced in commercial quantities there shall be substituted for such date the date on which the Secretary determines that oil shale or associated minerals cease to be produced from the claim in commercial quantities.

"(G) The provisions of sections 4 and 6 of the Act of August 13, 1954 (30 U.S.C. 524 and 526), popularly known as the Multiple Minerals Development Act, and the provisions of section 4 of the Act of July 23, 1955 (30 U.S.C. 612), popularly known as the Surface Resources Act, shall apply to claims for which an election under this paragraph has been made in the same manner and to the same extent as such provisions apply to the mining claims referred to therein.

"(e) In addition to other applicable requirements, any person who holds a lease pursuant to paragraph (2) of subsection (d) or who maintains a claim pursuant to paragraph (3) of subsection (d) or pursuant to subsection (f) shall be required, by regulation, to reclaim the site subject to such lease or claim and to post a surety bond or provide other types of financial guarantee satisfactory to the Secretary before disturbance of the site to insure such reclamation. The Secretary shall promulgate such regulations as may be necessary to implement this subsection.

"(f)(1) If a patent application was filed with the Secretary before January 24, 1989, for an oil shale claim referred to in subsection (a) but all requirements established under sections 2329, 2330, 2331, 2333 of the Revised Statutes (30 U.S.C. 35, 36, and 37) were not fully complied with by that date, the Secretary may issue a patent under this subsection notwithstanding the failure to meet those requirements by that date if such requirements are subsequently met and the Secretary determines the claim to be valid (after review as provided in subsection (c)). The patent shall be limited to the oil shale and associated minerals on such claim. Upon compliance with such requirements, such patent may be issued upon payment to the Secretary of $2,000 per acre.

"(2) Any patent under this subsection shall be subject to an express reservation of the surface of the affected lands, and the provisions of sections 4 and 6 of the Act of August 13, 1954 (30 U.S.C. 524 and 526), popularly known as the Multiple Minerals Development Act, and of section 4 of the Act of July 23, 1955 (30 U.S.C. 612), popularly known as the Surface Resources Act, shall apply to such claim in the same manner and to the same extent as such provisions apply to the unpatented mining claims referred to in such provisions.

"(3) No claimholder having a claim described in this subsection shall be required to make an election under subsection (d).".

Passed the House of Representatives June 1, 1989.

Attest: DONNALD K. ANDERSON,

Clerk.

Senator **Bingaman**. Our first witness is James Hughes. Jim is the Deputy Assistant Secretary for Land and Minerals Management at the Department of the Interior. We appreciate your being here. I know you have worked on this issue and related issues for a long time.

STATEMENT OF JAMES M. HUGHES, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. **Hughes**. Thank you, Senator. I appreciate the opportunity to appear here today to discuss S. 30 and H.R. 2392. I will try to summarize my statement and place the entire statement in the record.

We are opposed to enactment of both S. 30 and H.R. 2392 as they are presently drafted. However, let me assure the subcommittee that the administration and Secretary Lujan want to resolve the issue of oil shale, and we look forward to working with the subcommittee in trying to come to some resolution of this issue.

Before I explain our opposition to the legislation, I would just like to highlight some of the factors the Department and the administration feel are very important and should be addressed in any legislative solution to this issue.

We want to resolve the oil shale issue. It remains an enigma some 70 years after many had thought Congress had resolved it in 1920.

Among the several issues Secretary Lujan has indicated that we are concerned about first is the $2.50 an acre patenting fee. The Secretary believes strongly this is not a relevant figure in 1989. We are addressing this issue in a legislative proposal we currently have going through administration review. We are looking at some options. Although we have not signed off on any options on that fee figure, the Secretary remains very forceful in his attitude that $2.50 an acre is just not the fee we should be charging in 1989.

Probably one of the most important factors in driving us to currently oppose S. 30 and H.R. 2392, is our concern about the impact of the legislation on existing property interests and related potential for takings exposures resulting from either the implementation of S. 30 or the implementation of H.R. 2392. At least three elements of the bills raise taking questions and therefore the risk of potential taking adjudication later on which might result in some Federal liability.

First, the bills would require paying increased fees for assessment work in patenting and an excessive holding fee.

Second, the bills limit and in some instances preclude patent issuance irrespective of the status of the existing claim.

Third, and irrespective of existing mining claims, the bills offer an illusory choice either to lease or to retain the claim. Indeed, the requirements for retention of the claim in S. 30 are so stringent that the only real choice for a claimant is to convert his claim to a lease. In H.R. 2392, the 100-year claim cancellation provision turns the claim election into a lease in fact.

Fourth, we feel strongly that all oil shale is a separate issue in terms of the 1872 mining law as evidenced by its amendments to the 1920 Mineral Leasing Act.

Fifth, in our view many of the remaining claimants would be willing to ultimately accept a solution in which the Federal Government retains rights to the surface and non-oil-shale mineral deposits while the claimants receive title to the oil-shale deposits together with the right to mine and remove them.

Sixth, we believe strongly that those who have patent applications pending should be grandfathered to reduce the takings risk.

Seventh, we believe that legislative recognition of the Department's discovery standard based on *Freeman* v. *Summers* is essential to prevent challenges to the Department's use of these standards in making validity determinations.

Eighth, we believe that it is essential that the Congress establish by law the Department's standard of what is sufficient time for the Federal Government to establish a lapse of assessment work so that a claim can be canceled.

Ninth, both bills have unrealistic timeframes for actions by both the Secretary and the claimants.

Again, we think that all of the parties who are really involved with this issue are not as far apart as some people might think. I know earlier this year and late last year there were attempts to reach some degree of a potential solution out in Colorado. It is my understanding, although I did not take part and I do not think people in the Department directly took part in those negotiations, they came very close to coming up with the compromise. And I know Congressman Campbell from the Grand Junction area mentioned that to Secretary Lujan earlier this year.

Again, perhaps following this hearing, if people are of a mind to, perhaps we can sit down and again try and see if we might reopen those negotiations to see if we can come up with a solution.

That will conclude my testimony, Senator.

[The prepared statement of Mr. Hughes follows:]

JUL 31 1990

STATEMENT OF JAMES M. HUGHES, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION, SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, ON S. 30, A BILL "TO PROVIDE FOR CERTAIN REQUIREMENTS RELATING TO THE CONVERSION OF OIL SHALE MINING CLAIMS LOCATED UNDER THE GENERAL MINING LAW OF 1872 TO LEASES, AND FOR OTHER PURPOSES", AND H.R. 2392, AN ACT "TO AMEND SECTION 37 OF THE MINERAL LEASING ACT RELATING TO OIL SHALE CLAIMS, AND FOR OTHER PURPOSES".

I appreciate the opportunity to appear here today to discuss S. 30 and H.R. 2392. We are opposed to enactment of both S. 30 and H.R. 2392. However, let me assure the Subcommittee that the Administration wants to resolve the issue of oil shale and would gladly work with the Subcommittee to do so. Before I explain the basis of our opposition to this legislation, I will briefly highlight the history of oil shale mining claims over the past 69 years, and what has brought us to the situation that exists today.

The Administration wants to resolve the oil shale issue. It remains an enigma some 70 years after many had thought Congress resolved it in 1920.

We have several items we think must be considered in any solution.

First, Secretary Lujan thinks the $2.50 an acre patenting fee is not a relevant figure in 1990. We are addressing that issue in a legislative proposal currently undergoing administration review.

Second, we are very concerned about the impact of the legislation on existing property interests and the related potential for "takings" exposure resulting from either S. 30 or H.R. 2392. At least 3 elements of the bills raise takings questions. First, the bills would require the payment of increased fees for assessment work and patenting and an excessiva holding fee.

Second, the bills limit and in some instances preclude patent issuance irrespective of the status of existing claims. Third, and irrespective of existing mining claims, the bills offer an illusory choice either to lease or to retain the claim. Indeed, the requirements for retention of the claim in S. 30 are so stringent that the only real choice for the claimant is to convert his claim to a lease. In H.R. 2392, the 100-year claim cancellation provision turns the claim election into a lease.

Third, we feel strongly that oil shale is a separate issue in terms of the 1872 Mining Law as evidenced by its 1920 amendments to the Mineral Leasing Act.

Fourth, in our view many of the remaining claimants would be willing to ultimately accept a solution in which the Government retains rights to the surface and non-oil shale mineral deposits while the claimants receive title to the oil shale deposits together with the right to mine and remove them.

Fifth, we believe strongly that those who have patent applications pending should be grandfathered to reduce the "takings" risk.

Sixth, we believe that legislative recognition of the Department's discovery standard based on Freeman v. Summers is essential to prevent challenges to the Department's use of these standards in making validity determinations.

Seventh, we believe that it is essential that the Congress establish by law the Departmental standard of what is a sufficient time for the Federal Government to establish a lapse of assessment work so that a claim can be cancelled.

Eighth, both bills have unrealistic time frames for actions by both the Secretary and the claimants.

Frankly, we think all the parties involved in this issue are not as far apart as some might think. Perhaps following this hearing we might all get together and negotiate in good faith. We could resolve this.

Oil shale mining claims have presented the Department of the Interior with some very difficult issues that have eluded definitive solution for 69 years. Although the mining claims have been in existence for at least 70 years, policy debates and litigation often delayed the Department from taking final action on a significant number of claims. Basically, the history of oil shale mining claims has been the history of the executive, legislative and judicial branches of government wrestling with the question of what actions are required of an oil shale mining claimant in order to maintain the claim and go to patent. There is no clear, unequivocal interpretation of law to serve as a guide to the claimant and the Federal administrator so that all remaining claims can be handled consistently and equitably, with due recognition of any legal rights which may have enured to the claimants.

Although all three branches of government have addressed the issues surrounding oil shale mining claims, they have arrived at no definitive solution. We believe a legislative solution to these long standing issues is needed in order to:

establish finality and certainty for the claimant and the Federal administrator;

ensure that the equities of the claimant that have accrued over time are recognized and protected;

eliminate time consuming and costly litigation; and

establish an administrative process that is manageable by the Federal Government at a reasonable cost.

These are the key elements of the mining law in the context of oil shale mining claims.

Location

To establish rights to oil shale under the mining laws, the claim must pre-date the Mineral Leasing Act of 1920. Oil shale was properly located as placer mining claims in rectangular form by legal subdivision (30 U.S.C. 35). State law controlled as to the form of monumentation and posting of notice on the ground. Basically, given that all oil shale claims are more than 69 years old, the veracity of the original locators is difficult to challenge and must be accepted at face value unless compelling evidence dictates otherwise.

Recordation

Recordation represents the initial filing of a notice of a claimant's interest in a valuable mineral deposit within the limits of a mining claim and the annual filing of affidavits of labor performed. Historically these filings were made only with the county. The Federal Land Policy and Management Act of 1976 required that a notice of location and annual filings of affidavits of labor, or notices of intent to hold, also be filed with the Bureau of Land Management (BLM).

Failure to make the initial filing with BLM as required by The Federal Land Policy and Management Act voids a claim. Any oil shale mining claim not filed initially by October 22, 1979, ceased to exist as of that date. Annual filings are monitored by BLM and any lapse conclusively voids the claim.

Discovery

The discovery of a valuable deposit of minerals is the most fundamental aspect of the mining law (30 U.S.C. 22). Without discovery, there is no vesting of rights in the land.

During the 1920's the Department began patenting oil shale claims on lands of the Green River Formation. Initially this occurred where there was rich oil shale at the surface, and subsequently, where only lean beds were exposed which led to the inference that richer deposits were present at depth. This standard was delineated in a 1927 Departmental decision, Freeman v. Summers, the case in which the allowance of geological inference was first established, and the prospective value of oil shale was held to be sufficient for patenting.

This relaxed standard met with controversy. However, after the Senate Committee on Public Lands and Surveys, in 1931, examined the Departmental discovery standard as set out in Freeman v. Summers, the Committee Chairman, Senator Nye, advised the Department to proceed with patenting under this standard. From 1931 to 1960, the Department followed this policy. Five hundred twenty-three patents covering almost 350,000 acres were issued during this period.

In 1961 the Department changed its policy. DOI began to impose the traditional discovery standard placing emphasis on the lack of profitability of producing shale oil. In other words, it required a showing of the likelihood that a claim could be operated with a reasonable prospect of success as a commercial venture. This more restrictive discovery standard was rejected in 1980 by the Supreme Court in Andrus v. Shell Oil Co. when the majority held that Congress recognized the prospective value of oil shale in the Mineral Leasing Act and that Freeman v. Summers was correct.

Maintenance (Annual Assessment Work)

The other major controversy associated with the management of oil shale mining claims since the passage of the Mineral Leasing Act in 1920 is the obligation to perform assessment work The savings clause of that Act required oil shale mining claims to be maintained in accordance with the mining laws. Under the mining laws, to hold a claim, a claimant must perform at least $100 worth of assessment work per claim each year (30 U.S.C. 28). The purpose of this provision was to encourage diligent development of the claim. Failure to perform this labor allows location of an adverse claim by rivals, unless labor is resumed first. If labor is resumed before a rival claim is placed on the land, the resumption principle of the mining laws serves to bar adverse actions against the claim (30 U.S.C. 28).

In the 1920's and early 1930's, the Department contested a number of oil shale mining claims for failure to do assessment work. These contests resulted in two Supreme Court decisions adverse to the Department. The first, Wilbur v. Krushnic (1930), held that the government was barred from contesting a mining claim for failure to perform annual assessment work as long as the claimant resumed performance prior to the contest. The second, Ickes v. Virginia-Colorado Development Co.(1935), held that the government could not contest the claims for failure to perform assessment work. As a result of these adverse court decisions, the Department reversed its decisions invalidating claims for lack of assessment work, and from 1935 to the early 1960's, issued patents to approximately 350,000 acres of land regardless of whether assessment work was done, continuing to use the Freeman v. Summers precedent to verify the discovery of a valuable oil shale deposit.

In 1960, the Department changed its policy regarding assessment work requirements. It began rejecting patent applications for oil shale claims that it deemed invalid because of lack of assessment work.

Plaintiffs in the recent TOSCO litigation challenged, in part, decisions invalidating their claims under this policy. These plaintiffs first brougnt suit which resulted in a District Court decision in 1966 that the Department lacked authority to contest the claims for lack of assessment work. This decision was affirmed by the Court of Appeals in 1969 and in 1970 the case came before the Supreme Court. The Supreme Court, in Hickel v. TOSCO, held that the Department could contest claims where a claimant failed to "substantially comply" with the assessment work requirement. The Supreme Court, however, did not define the term "substantial compliance" nor did it indicate any guidelines for developing a definition. Instead the Supreme Court remanded the case to the District Court to allow the applicants to bring their claims "within the narrow ambit meaning" of Krushnic and Virginia-Colorado Development Corp. Judge Finesilver, in deciding Tosco v. Hodel, held that this "narrow ambit" includes the holding in Krushnic that the resumption principle operates against the Federal Government as well as against rival locators. In fact, the government recognized the validity of this principle in the written arguments filed with the Supreme Court in the TOSCO case and expressly stated that it was not seeking to overturn it.

In 1972 the Department provided constructive notice alerting all mining claimants that their claims were subject to cancellation for failure to substantially comply with annual assessment requirements (43 CFR 3851.3[a]). Since 1972, the Department is in a better position to contest claims because of nonperformance of annual assessment work, subject to the constraint of the resumption principle.

The mining law (30 U.S.C. 28) provides that relocations can be made only while the claimant is in default of his annual obligation if there is to be a forfeiture of rights. Similarly, the Department must initiate contest action before a mining claimant resumes his labor or be barred from contesting the claim on this basis. In other words, as the Supreme Court held in Wilbur v. Krushnic (1930), the government may not take advantage of a past lapse of assessment work when such work is resumed prior to initiation of the contest.

Affidavits of assessment work filed with the Bureau of Land Management in 1979 and thereafter for all but 108 oil shale claims attest that such labor has been resumed. Filing under the Federal Land Policy and Management Act of a notice of intent to hold a mining claim creates no such presumption of performance of labor. Therefore, the filing of a notice of intent to hold a mining claim led BLM to challenge the claims on the basis that there had not been substantial compliance with the obligation to annually perform labor, or make improvements, of not less than $100 per claim. The Department successfully eliminated 108 oil shale mining claims in this manner. The

Department accepts the affidavits of assessment work filed annually since 1979 under section 314 of the Federal Land Policy and Management Act (FLPMA) as factual unless compelling evidence to the contrary is presented.

We have exercised our option as a "rival locator" to contest these claims during this presumed lapse of annual assessment work, in keeping with the constraints imposed by the resumption principle. Our contesting of those 108 mining claims for which no affidavits of assessment work were filed for the last 2 or more years demonstrates that we will insist upon performance of the statutory minimum amount of annual assessment work and will monitor compliance by way of annual filing requirements of the Federal Land Policy and Management Act. We will continue to inquire into alleged nonperformance of assessment work obligations by initiating contest proceedings, when, and if, notices of intent to hold, rather than affidavits of assessment work, are filed for two consecutive years. A 1-year lapse is insufficient to permit contest by the government based on the decision in Ickes v. Virginia-Colorado Development Corp, where the Supreme Court refused to allow invalidation of a claim with a 1-year lapse. When the Supreme Court established the "substantial compliance" standard in the Hickel v. Tosco decision, it recognized that the earlier Court in Ickes had allowed a 1-year lapse. Since the Court did not overrule Ickes in its Tosco decision, and in fact recognized its continued, albeit limited, applicability, we will wait for a 2-year lapse before initialing a contest.

S. 30

S. 30 is intended to address the outstanding oil shale claims. Section 2 of S. 30 would provide that with regard to any oil shale claim located prior to enactment of the Mineral Leasing Act, no patent could be issued after January 25, 1989, except for those claims for which a patent application had been filed and all requirements for a patent had been fully complied with by January 25, 1989.

Section 3 of the bill would require the owner of a valid oil shale mining claim located under the General Mining Law of 1872 prior to enactment of the Mineral Leasing Act to make an election either to convert the claim to a lease or to maintain the claim by complying with the mining laws and the additional requirements of S. 30. The Secretary would be required to notify the owner of each claim of the required election within 30 days of enactment of the act, and the claimant would have to make the election within 180 days of enactment of S. 30. Failure to make an election within that period would be deemed conclusively to constitute an abandonment of the claim.

If the holder of a claim required to make an election decides to convert the claim to a lease, the lease would be required to be issued within 60 days of the election and would be administered in accordance with the Mineral Leasing Act, with certain exceptions.

Section 3 also would allow a holder of a claim to elect to maintain the claim by complying with the mining laws of the United States and the provisions of S. 30, that would require that:

> Beginning with the date of enactment of S. 30, $1,000 worth of labor must be performed or improvements made during each and every year. Failure to fulfill the requirement each and every year would constitute an abandonment of the oil shale mining claim; and

> In addition to the requirements of section 314 of the Federal Land Policy and Management Act, the owner of an unpatented oil shale mining claim would have to file annually an affidavit of assessment work. Failure to file the affidavit would constitute an abandonment of the oil shale mining claim.

Section 4 of S. 30 would amend the Mineral Leasing Act by adding a new section 45 which would prohibit the Secretary from issuing or approving the assignment of any lease under the terms of the Mineral Leasing Act to any entity that elects to hold an unpatented oil shale mining claim rather than convert such claim into a lease under the terms of S. 30.

Section 5 of S. 30 would provide that any person holding a lease or maintaining a claim pursuant to the bill would be required to reclaim the site and to post a bond before disturbance of the site to guarantee reclamation. Any person holding a lease issued or readjusted pursuant to section 21 of the

Mineral Leasing Act of 1920 after the date of enactment of S. 30 also would be subject to such requirements. The Secretary of the Interior would be required to promulgate regulations as necessary to implement S. 30.

We are strongly opposed to enactment of S. 30, for several reasons.

Section 3(b)(3) would eliminate the proviso in the Mineral Leasing Act that allows the Secretary to waive rent and royalty payments for the first five years of an oil shale lease in order to encourage production. We believe that the Secretarial discretion should be retained so that if the need arises, production can be encouraged. If the intention of this bill is to promote orderly development through leasing, this provision is certainly contrary to that goal.

Sec. 3(b)(5) sets the royalties on any claims that are converted to leases at not less than 12.5 percent rather than allowing the Secretary to exercise discretion to promote development of the resource. We believe the bill should provide for Secretarial discretion.

Section 4 of S. 30 would disallow the issuance of a lease under the Mineral Leasing Act of 1920, as amended, to any entity that elects to hold an unpatented oil shale mining claim rather than convert such claim into a lease under the terms of section 3(b) of S. 30. This prohibition is similar to the diligence requirement in section 3 of the Federal Coal Leasing Amendments Act of 1976 except that it would extend to all oil shale claimants whether or not there had been diligent development of oil shale on the claim. For owners of oil shale claims that wish to seek mineral leases for oil, gas, coal, sodium, potash, phosphate, gilsonit or geothermal resources, S. 30 is an absolute curtailment of their rights to bid for leases on these commodities. If the largest companies holding oil shale mining claims were prevented from obtaining any other mineral leases under the Mineral Leasing Act, the effect would be catastrophic to the claim holder as well as to the Federal Government. If a major corporation is eliminated from bidding for other minerals, the reduced competition could easily result in lower bids that would mean less revenue to the Federal and State governments.

The Mineral Leasing Act in 30 U.S.C. 241(a) already contains an invitation to voluntarily convert pre-1919 oil shale claims into leases. To the best of our knowledge no takers have come forward.

Few, if any, oil shale claim owners would be willing to convert a mining claim to a lease under S. 30 because a lease will expire at the end of 20 years if commercial production is not ongoing then. In addition, even if production were accomplished on the leasehold, the requirement to pay royalty diminishes the value to the claimant of the property that enured under the mining laws and thus might constitute a taking.

We feel the bonding provision in section 5 is unnecessarily restrictive. It would be more appropriate to allow the Secretary to determine whether a bond or some other type of financial guarantee satisfactory to the Secretary that assures reclamation.

H.R. 2392

Where provisions of S. 30 and H.R. 2392 are similar, we have the same objections to both. I will briefly discuss the principal differences between H.R. 2392 and S. 30 and then address our concerns.

Section 2 of H.R. 2392 would amend section 37 of the Mineral Leasing Act. New section 37(b) would require that the Secretary, within 30 days after enactment, publish proposed regulations containing standards and criteria for determining validity of oil shale claims. The Secretary would be required to promulgate final regulations not more than 180 days after the proposed regulations are published. The Secretary would then be required to make determinations as to the validity of all oil shale claims within 2 years of the issuance of final regulations. Priority would be given to those claims for which patent applications had been filed prior to January 24, 1989, which had met all the requirements of law. S. 30 has no comparable provision.

We object to the requirement for determinations of validity to be made in 2 years because it is unrealistic. It is well established in both administrative and judicial case law that a mining claim must be presumed to be valid until affirmatively established otherwise. Mining claimants must be given an opportunity to be heard on questions of fact regarding the validity of their claims.

The Interior Department meets this due process burden by holding evidentiary hearings. Not until a final administrative decision of the Secretary is issued, usually by the Interior Board of Land Appeals [IBLA]), can a mining claim be declared void. Unless the bill contemplates a "map exercise" to verify discoveries required under the mining law and a reliance solely upon affidavits of assessment work without field inspections to verify resumed assessment work, an army of geologists and mining engineers would be required to meet this requirement. Even then, assuming that a significant portion of the approximately 1,600 outstanding claims are contested, it is not possible to conclude the hearings and potential appeals within 2 years. The cost to BLM of doing field examinations and preparing mineral reports on that number of claims has been estimated to be approximately $5 million. Further costs would be incurred by the Department's Office of Hearings and Appeals, BLM, and the Office of the Solicitor during the prosecution of contests.

In addition to the cost, the completion of field work and mineral report preparation and review could easily require 5 years aside from the time needed for contests and appeals.

H.R. 2392 provides no guidance as to the standards of validity the Secretary would be expected to use. Normally, the Department follows case law. However, with respect to oil shale the interpretation of some of the decisions rendered by the courts has been a matter of considerable criticism after the Department negotiated the settlement of the TOSCO v. Hodel litigation in 1986.

New section 37(d)(3) would require the holder of an oil shale claim that elects to maintain it as a mining claim, rather than converting to a lease, to make diligent development expenditures upon each claim of not less than $5,000 annually. Although not called assessment work, that is indeed what this requirement is. S. 30 has a similar election requirement but would raise the assessment work requirement for oil shale claims to $1,000 per claim per year. We believe the 50-fold increase in H.R. 2392 is unrealistic and unsupportable. One hundred dollars in 1872 equalled approximately 20 days of labor, valued now at about $1,700 - $2,000, not $5,000.

New section 37(d)(3)(B) would allow holders of mining claims to make a $5,000 payment to the Secretary in lieu of diligent development. Such moneys would be split 50-50 between the General Fund of the U.S. Treasury and the State in which the claim lies. S. 30 has no such provision.

Mineral Leasing Act revenues are shared with the States on a 50-50 distribution in order to assist the States with funding the infrastructure of roads and schools that mineral development and employment bring. However, it is hard to justify sharing with the States the payment in lieu of diligent development as proposed in H.R. 2392 since the States will not incur any infrastructure cost until development takes place.

We believe that few if any claimants would elect the payment in-lieu option. Because their own labor qualifies as an expenditure, it would be necessary for the Secretary to evaluate such labor. This is an enormous task in terms of additional personnel and funds to monitor the performance of this diligent development work.

New section 37(d)(3)(F) would deal with unpatented oil shale claims not producing in commercial quantities within 100 years from their dates of location, or about 2018-19 for most claims. If production is occurring as of that date, the claim would still be canceled if commercial production ceased thereafter, presumably irrespective of the cause. S. 30 has no similar provision.

This provision would subject the unpatented claimant to the whims of the oil market and he may have to produce at a loss in order to maintain his possessory right if conditions so warranted. To avoid this, a claimant could seek patent to the oil shale and associated minerals within the claims, but section 2(f) would raise the $2.50 per acre price for placer claims now established by the Mining Law to $2,000 per acre for oil shale.

While we are opposed to the enactment of S. 30 and H.R. 2392, we would like to work with the Subcommittee in a cooperative spirit to come up with a solution to the issues relating to oil shale claims.

This concludes my statement. I will be pleased to answer questions.

Senator BINGAMAN. Let me ask just a few questions. I am sure Senator Wirth will have other questions when he arrives, but let me ask a few at this time.

You suggest that pending patent applications should be grandfathered to reduce the risk of a taking occurring. How many of those do we have?

Mr. HUGHES. In the House bill, the House basically breaks the patent applications into three categories. One is patent applications that had all their work done before January 24, 1989, and basically were waiting for a determination from the Department of the Interior and some steps we have to go through. Basically, those applicants have a first half final certificate. The records, I have, show there are six patents involving 68 claims in that category. I have been told by the attorneys that these have the highest degree of a takings risk in the three categries.

Senator BINGAMAN. How much acreage are we talking about there?

Mr. HUGHES. Roughly 10,483 acres is the figure I have been given, and I will double check that, Senator.

The second category I have been told are the claimants who filed for a patent before January 24, 1989, but have not really completed all of their paperwork. There are nine patents involving 275 claims, and that is roughly another 44,000 acres.

Senator BINGAMAN. What have they done? How much work has been done to perfect that patent?

Mr. HUGHES. They have not completed all of the requirements to get their first half final certificate. So, there is still some paperwork that they have to supply and some items they have to do as well as the Department having to respond to those applications.

That is sort of the second level—the next degree of risk according to our attorneys.

Then, of course, the final group are the unpatented claims where no patent application has been made.

Senator BINGAMAN. You are not claiming that there is anything being grandfathered with regard to the third group?

Mr. HUGHES. At this point, no. Again, some people have told us in the past and some of our attorneys have told us in the past that you might want to create some sort of window—this is the so-called window issue—that would allow them a short time to come in and file a patent application. And that I think would be your sort of 100 percent, no-risk factor.

I think we have had other attorneys tell us that those folks have had a number of years now over the course of history to file those applications, and a takings case would be probably much more difficult for them to make.

The grandfathering we are referring to is more for the first and second category where they have already actually filed patent applications.

Senator BINGAMAN. So, you are talking about the 10,000 acres that is in the first category and the 40,000 some odd acres in the second category.

Mr. HUGHES. Right. And again, in discussions with Justice and our attorneys, we are talking about the degrees of risk here.

Senator BINGAMAN. Tell me again the status of the negotiations that you referred to that you were hoping could begin again at some stage.

Mr. HUGHES. Well, we were not part of those negotiations, but I know Congressman Campbell approached Secretary Lujan earlier this year with hopes that the folks in the State of Colorado—I think they included the State, some environmental groups, county and local officials, as well as the claimants—were trying to reach some sort of compromise proposal to bring to Congress. Congressman Campbell at that point was very encouraged that they might reach finality on those negotiations, but apparently for some reason they broke down toward the end. I have heard secondhand there were three or four items that the groups just could not come together on.

Senator BINGAMAN. Why is the Department of the Interior not involved in those discussions?

Mr. HUGHES. Well, I can't speak to that. I think we were in touch with the folks who were negotiating. This really started taking place last year. And one of our employees at the Department did attend a meeting in Colorado with the folks who were negotiating, but I do not think we formally were involved with what you might want to call a Department position in the negotiations.

Senator BINGAMAN. Senator Wirth, did you have questions of Jim Hughes at this point before we go to the second witness?

Senator WIRTH. I did, Mr. Chairman. Thank you very much, and we appreciate your having this hearing on this very controversial and important issue.

Mr. Hughes, do you know about the history in 1986 of the some 17,000 acres of U.S. Government land that the Interior Department settled for $2.50 an acre which then—are you familiar with that?

Mr. HUGHES. I know some of the background, sir.

Senator WIRTH. Do you know what then happened to that 17,000 acres?

Mr. HUGHES. I have been told—again, I do not have firsthand knowledge—that I believe Shell Oil came in and purchased the rights from some of the claimants.

Senator WIRTH. How much did they purchase them for? Do you know?

Mr. HUGHES. I have heard the figure, and I think it was $37 million.

Senator WIRTH. The government gave these patent holders—was given by these patent holders $42,000, and then turned right around and $37 million was sold on that. Right?

Mr. HUGHES. That is my understanding.

Senator WIRTH. Now, your responsibility is to try to figure out what we are going to do about this. Right?

Mr. HUGHES. That's correct.

Senator WIRTH. Wouldn't one of the first things you would want to do is to have a sense of the size and the scope of the parameters of the problem? It seems to me that you start with $2.50 an acre, and at the other end, it is sold for $2,000 an acre. The Government gets $42,000, and at the other end of the scale, somebody sells it for $37 million. Doesn't that give you a sense that those are the outlines of the problem?

Mr. HUGHES. Yes, sir.

Senator WIRTH. You ought to know that. Right?

Mr. HUGHES. Yes, sir.

Senator WIRTH. Now, there is a GAO study that confirms those numbers. Those are very real numbers. Isn't that right?

Mr. HUGHES. I have not seen that study, but I——

Senator WIRTH. We will make sure that you have it.

I raise that just to say that there are a lot of people who are just outraged by this. It offends one's sense of what is right, doesn't it, that on the one hand the Federal Government ends up selling land for $2.50 an acre, effectively what happens, and those people then turn around and are getting $37 million for it? Doesn't that offend you?

Mr. HUGHES. It would, sir, if certain other factors were not involved.

Senator WIRTH. And what are the other factors?

Mr. HUGHES. You know, we are talking about degrees here. I think in this case there were folks who went to court, as I understand, have been in court with the Federal Government. The Federal Government has spent millions of dollars during the past 60 plus years going after these claimants. And I am not an attorney, but I know there have been millions of dollars spent in litigation. That somewhat offends me in terms of the degree.

Senator WIRTH. There have been millions of dollars? Can you document millions of dollars being spent in litigation?

Mr. HUGHES. I have been told that.

Senator WIRTH. And until 1986, the Department of the Interior had refused to settle in this way. And suddenly the Department of the Interior turns around and makes a settlement that effectively is a gift of some tens of millions of dollars.

Mr. HUGHES. I think up until 1960, the Department took one view. Starting in 1960, it was my understanding they took another view.

Senator WIRTH. But in the mid-1980's it made the decision to sell the land for——

Mr. HUGHES. Settle.

Senator WIRTH [continuing]. Settle and sell the land for $2.50 an acre.

Mr. HUGHES. That's correct.

Senator WIRTH. Do you think there is any parallel in this between what went on in HUD and what is going on in the S&L business and one issue after another——

Mr. HUGHES. No, I don't.

Senator WIRTH [continuing]. In terms of this kind of privileged treatment of a handful of people by a few executives at the highest levels of the executive branch?

Mr. HUGHES. No, sir. I think in this case the court situation made it much, much different than the HUD matter.

Senator WIRTH. I do not know how the court situation could make it much different when the Interior lawyers, the career people, were saying we shouldn't do this sort of thing, and the political appointees came in and did it.

But in any case, I find this—you know, when you say to people that the Federal Government was giving away land or selling land, effectively selling it for $2.50 an acre, and then turned right around and sold it for $2,000 an acre, you can't believe that the interests of the taxpayer were being protected by the Government.

In 1988 your predecessor wrote that this primary responsibility—he wrote April 29, 1988. He said, "From the Department's perspective, the primary objective is to ensure that the possessory and equitable rights of the claimants are acknowledged and protected." He said that was the primary responsibility.

Now, I thought that the primary responsibility of the people running the Interior Department was to be stewards of the public land.

I would like to send you a copy of that letter, if I might, Mr. Hughes. I find it amazing that an official of an agency charged with the responsibility of being a steward of the public lands would declare that the No. 1 goal is to be an advocate for individual mining claimants. That also sort of offends my sense of what stewards of the Federal Government ought to be.

I draw the parallel with the HUD situation not loosely. The record, it seems to me, is a pretty tough one. And this was not your watch. I realize that, but I'm only describing the situation in which the legislative remedies that many of us have been advocating, it seems to me, ought to have a kind of urgency about them and ought to also be overlain with a sense of outrage that many people feel. In addition to this, there are lots of people in western Colorado, for example, who had used this land for a long, long time where they had gone hunting on it. It was public lands. They had access to it. Suddenly it was fenced off, sold off. A herd of mule deer was then isolated, not made available to people there. And they were saying, hey, what's going on. Two dollars and fifty cents an acre it turns around and sells for $2,000 an acre.

Mr. Chairman, I realize that Mr. Hughes has this responsibility and that he is new to this. I just wanted to ask these questions, sir, for the purposes of illustrating the size and scope of the problem as I see it. I think it was a scandal. I think it was the wrong thing to do no matter how much one sits and tries to justify doing this on the basis of litigation and so on. The career people saying don't do it; the other people came out and settled the land in that fashion. And I just think that that was wrong, and I think it is our responsibility to get this rectified as rapidly as possible.

Thank you, Mr. Chairman.

Senator BINGAMAN. Thank you.

Why don't we excuse you, Mr. Hughes—thank you very much, Jim. I appreciate it—and ask the next witness to come forward? It is Ron Cattany, assistant director of the Colorado Department of Natural Resources in Denver. And let me also at this point turn over the hearing to Senator Wirth to handle. You might want to come over here and do that.

Senator WIRTH [presiding]. Mr. Cattany, thank you very much for coming in. We have been through this drill before. Why don't you proceed in whatever way you think would be most helpful? We will include your statement in full in the record, as you know. Why don't you summarize in whatever way you think would be most useful?

STATEMENT OF RONALD W. CATTANY, ASSISTANT DIRECTOR, COLORADO DEPARTMENT OF NATURAL RESOURCES

Mr. CATTANY. Thank you very much, Senator.

Today I am testifying on behalf of Governor Roy Romer and Hamlet J. Barry III, the executive director of the department of natural resources. In addition to my statement, there are four attachments: our testimony before this committee 2 years ago, our testimony earlier this year in the House, our analysis of the impacts of the oil-shale claims that were patented in 1986, and a series of documents from the Bureau of Land Management on their criteria for validating oil-shale claims, those claims exempted under the current laws and the basic provisions of the 1986 Interior agreement with the claimants.

I have also submitted for the record, a statement on behalf of Peggy Rector, who is the Rio Blanco County commissioner and chairman of the group that was working in Colorado last year to develop a compromise to this issue.

Today I have been asked to discuss three issues. The first is the efforts in Colorado to build a consensus on the settlement of oil-shale claims in the northwestern part of the State. The second is the State's actions to date, and the third are our comments on the current legislation pending in the House and Senate.

First, with regard to the compromise effort, the oil-shale lands committee was convened by the Associated Governments of Northwest Colorado in July of last year. The committee consisted of organizations and individuals interested in developing a compromise legislative proposal, including State and local governments from Colorado and Utah, large and small claimants from those two States, agriculturists and conservationists. After an organizational period, the committee met for four times between August and February of this year.

Basically there were four areas of consensus during that compromise effort. The first related to surface rights. The claimants were willing to relinquish the surface rights usually associated with patent title. The surface access necessary to develop the oil-shale resource would be provided either through a mineral only patent or a surface right agreement. Current Colorado mining law guarantees surface access for development of mineral resources that have been severed from the surface rights.

The second area was oil-shale and associated minerals. All the parties agreed that the patent or lease rights should be limited to oil-shale and associated minerals, specifically nahcolite and dawsonite. In the case of the applications on file, only the Marathon claims have about 40 tons per square mile of dawsonite. There does not appear to be a market for this resource at this time, and there is no nahcolite on any of the affected claims. The rights with the other minerals, such as coal, oil and natural gas, should remain with the Federal Government.

The third area of consensus was NEPA requirements. All parties agreed that the National Environmental Policy Act and other environmental laws should apply to any oil-shale development. Public review and comment on amendments to resource management plans, where necessary, are essential for these types of land management decisions.

And finally, reclamation bond requirements. All parties basically agreed that adequate State and Federal reclamation bonds are necessary. The claimants propose that the State and Federal requirements be coordinated to avoid double bonding and that the State be given primacy in the reclamation process.

There were four areas of substantial disagreement. The first was a window of opportunity for additional patents. Whether or not claim holders with unpatented claims should have the opportunity to apply for patents was one of the key areas of disagreement. Options for a window of opportunity ranged from no window, to a closing date as of the date of enactment of the bill, to a 1-year period to file a notice of intent followed by 2 years to file an actual application.

The second area of disagreement was a validity test. All parties agreed that validity tests should be conducted rigorously. However, the claimants indicated they would resist any new standards other than those now required by the 1872 mining law. Conservationists believe the standards currently being used by BLM are too lax.

The third area of disagreement was related to the leasing option. All parties would either agree or require a leasing option. The claimants agreed to such an option only if new patent applications were allowed. However, the proposed 12.5 percent royalty rate was not supported by the claimants or local governments since variable royalty rates now exist for other minerals under the Mineral Leasing Act of 1920.

And the final area of disagreement was on the requirements to maintain unpatented claims. Disagreement exists on new requirements for maintaining or leasing an unpatented claim if there is no alternative to patent the claim. The claimants are willing, however, to have unpatented claims ruled invalid or subject to new requirements if applications are not filed in a 1-year period from the date of enactment of the bill.

That is a summary of the discussions and the compromise effort.

Colorado's position on these oil-shale claims is based on the belief that in many cases the surface right is now and may continue to be the valuable resource rather than the oil-shale right. Previous patents or leases account for the majority of the high-quality oil shale in Colorado. We believe that the State should play an active role in the management of the surface and prevent the patent of lands for purely speculative purposes.

We previously commented on both bills, and at one point commenced legal action on this issue because the Federal agencies attempted to settle 525 claims without notice or involvement by Colorado.

This litigation was settled based on voluntary surface management agreements between the State and the major claimants. The agreements request consultation with the State and local governments before major land use actions and require public access for certain recreational activities.

And we do believe that this is important because of the critical ecological, biological and wildlife features on several of the oil-shale lands. The lands affected by the 1986 patents had critical wildlife habitat and migration routes, riparian areas, elk calving and nursing areas, and habitat for several types of birds and several rare plant species.

The lands affected by the two bills currently under review are valuable, but not critical wildlife habitat. But the privatization of the surface will affect the protection of these and make the protection of these resources more difficult and will also alter longstanding surface agreements.

In reviewing the two bills right now, we have six areas that we believe need further clarification or expansion. The first is additional conditions on the transfer of surface rights for the claims exempted by both bills. The second is evaluation of all complete applications filed prior to January 24, 1989 for possible patent under certain conditions. The third is a redefinition of the validity criteria for the claims subject to patent. The fourth is an adjustment in the value of the assessment work necessary to maintain the claims and in the processing fees for the transfer. Fifth is the removal of the prohibition on lease issuance for oil-shale claim holders, and the sixth is an appropriate royalty rate for oil-shale production on leased lands.

With regard to the claims subject to patent, we in our testimony in February proposed that all complete applications filed as of January 24, 1989 be subject to the patent process. They would still be subject to a validity check, technical review, amendment and final approval by the Department. We felt that this broader definition was necessary because of the contradictory directions provided to the claimants by the Department of the Interior.

Our proposal did result in controversy with environmentalists saying that we were allowing fire sales to continue and the claimants claiming that we were denying them rights under law. Our goal is not to defend or promote invalid claims, nor is it to continue any fire sale at bargain prices. However, we do believe that valid oil shale claims are a vested right that should be protected.

With regard to the exempted claims, we would again reiterate the need for a surface management agreement with the State of Colorado if the surface rights are patented. And in our previous testimony, we laid out the elements of that surface right agreement, surface management agreement.

With regard to assessment work and patent fee, we have proposed a review and update of both of those dollar values. As passed, H.R. 2392 requires $5,000 per claim per year in annual assessment work and a $2,000-per-acre-patent fee. For the largest claim holder in Colorado, that would result in a cost of $20 million for patents. For the largest in Utah, it would be $34 million. In both cases, these are individuals, not corporations.

Given the size of the oil-shale claim areas and the potential value of the resource, the 1872 values are not appropriate in 1989. However, the fees that are set should not be set at a rate so as to preventing the patenting of valid mineral claims, nor should they be interpreted as a precedent for amendment to the 1872 mining law.

The $100 per claim annual assessment work under current law may not reflect the value of the resource under the claim. S. 30 proposes a $1,000-per-acre annual assessment requirement. This value may be a more realistic reflection of the value of the resource under claim. As a basis for this committee to use in establishing a compromise assessment fee, you could look at the current value of the resource, ranging from $500 to $1,500 per acre and up to $2,000 an acre for high grade oil shale for both surface and mineral rights. To minimize environmental disturbance, we do support the concept of a payment to the treasury in lieu of work on the ground.

The $2.50-per-acre patent fee was set in 1872 to reflect the value of the Government service that is provided in the patent process. Just as State government is required to review its fees from time to time, so should the Federal Government. It is our recommendation that Congress direct the Secretary to establish either an average cost for such a service or a system of direct billing of the actual costs incurred by the Department for each application that is processed.

With regard to a window of opportunity, we understand the need on the part of industry to have assurance that the patent process will move forward before the investment is made in patent applications. Similarly, we recognize the position of the conservationists that it has been clear for the past 2 years that a patent process would be developed legislatively. For that reason, we have not proposed a window of opportunity, only a redefinition of the claims subject to the January 24 date.

Since that time, to our knowledge, only Cleveland Cliffs has filed a patent application. The claimants have requested a 1-year window of opportunity to file applications. Local governments have proposed that the cutoff date be the effective date of the legislation that is passed. This decision clearly rests with Congress.

However, if additional patent applications are allowed, we ask that our four standards still apply: mandatory surface management agreements for exempted claims, relinquishment of surface rights for claims not exempted from the bill, public review and congressional oversight of the criteria to be used by BLM to assess the validity of the claims, and adjustment of the value of assessment work and the processing fee in issuing the patents.

With regard to validity test and timing, we do not want to prevent the patenting of valid oil shale claims. However, questions continue to be raised about the validity of some claims.

H.R. 2392 directs the Secretary of Interior to undertake an expedited 2-year program to determine the validity of all unpatented oil-shale claims affected by legislation. We request that the criteria be set by the Secretary and be subject to congressional overview and public review. The criteria should consider but not be limited to those applied to previous patents, and they should also reflect the issues raised in previous litigation.

In identifying the criteria we would like the Secretary to consider those ideas submitted to this committee in 1987 and to the House committee earlier this year, including discovery standards, geologic evidence of a valid deposit prior to 1920, the validity of the claim as of 1920, documentation of assessment work since 1971, evidence of abandonment, physical location on the ground, fraudulent location, et cetera.

We encourage congressional oversight to ensure that the mistakes of the past patenting efforts are not repeated. We also urge this committee or the conference committee to determine if a GAO audit of previously issued patents would provide useful information in developing the criteria for future patents.

With regard to leasing and royalty rate, we do view the conversion of the claims to a lease as an option. S. 30 currently stipulates a royalty rate of 12.5 percent on such leases. The State recommends that the lease rate be set at a level consistent with other leasable Federal minerals with options for hardship royalty rate reductions. If the goal of leasing is the development of the resource, the royalty rate in combination with the other factors of production should not make the resource uneconomic to produce.

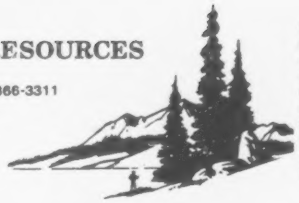
Finally on the prohibition of lease issuance, S. 30 currently contains a provision which would apparently preclude the issuance of any Federal mineral lease to holders of oil-shale claims located under the 1872 mining law. Normally this type of a provision is a punitive action for noncompliance with Federal law. For example, under the Surface Mining and Coal Reclamation Act, lessees who are in violation of coal reclamation standards are prohibited from receiving other leases. Holding oil-shale claims, if they are valid and maintained according to law, should not be grounds for a prohibition on other leases.

Finally, the committee should also consider the impact of development of the claims on the agriculturist. At the time at which development occurs, the holder of oil-shale claims or lease should reimburse the surface lessee for the replacement value of all fences, corrals, and roads disturbed or displaced by such development. Language reflecting this should be in any type of summary legislation.

We do commend Senator Wirth and Representative Campbell on trying to resolve this issue. We believe that oil shale does have a long-term strategic value and look forward to working with this committee and the Department of the Interior in developing a resolution to the issue.

[The prepared statement of Mr. Cattany and Ms. Rector follow:]

STATE OF COLORADO ROY ROMER, Governor
DEPARTMENT OF NATURAL RESOURCES
HAMLET J. BARRY III, Executive Director
1313 Sherman St, Room 718, Denver, Colorado 80203 866-3311



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TESTIMONY FOR THE MINERAL RESOURCES DEVELOPMENT AND PRODUCTION SUBCOMMITTEE OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

BY
RONALD W. CATTANY
ASSISTANT DIRECTOR
COLORADO DEPARTMENT OF NATURAL RESOURCES

JULY 31, 1989

Mr. Chairman, thank you. I appreciate the invitation by Senator Wirth and your staff to participate in this hearing. I am testifying today on behalf of Governor Roy Romer of Colorado and Hamlet J. Barry, Executive Director of the Colorado Department of Natural Resources.

I request that this statement and accompanying support documents be included in the record. They include 1987 testimony on behalf of Colorado before this Committee (Attachment I); 1989 testimony before the House Subcommittee on Mining and Natural Resources (Attachment II); our analysis of the impacts of the patents issued in 1986 (Attachment III); and the current U.S. Bureau of Land Management (BLM) standards for validating oil shale claims, a listing of claims which could be subject to patent, those claims exempted from current legislation and the basic provisions of the 1986 Department of Interior agreement with claimants (Attachment IV).

Colorado welcomes the opportunity to comment on both the process and the substance of the settlement of oil shale claims in Northwest Colorado. The settlement of these claims is important not only to the companies and individuals wishing to invest in Northwest Colorado, but also to the local governments thato derive revenues from these projects and to the public who use these lands for recreation and agriculture. While the state does not have direct jurisdiction over this issue, our objective over the past three years has been to assure that a wide range of interests is considered in both the management and the disposition of our natural resources.

I have been asked to discuss three issues today: 1) the effort in Colorado to build a consensus on the settlement of this issue; 2) the state's actions to date; and 3) our comments on the current legislation pending in the House and Senate.

COMPROMISE EFFORT

The Oil Shale Lands Claims Committee was convened by the Associated Governments of Northwest Colorado following a town meeting in Rifle, Colorado on this issue in July of last year. The Committee consisted of organizations and individuals interested in developing a compromise legislative proposal. Committee membership represented the following: the City of Rifle, Rio Blanco County, Associated Governments of Northwest Colorado, the Utah State Energy Office, the Colorado Department of Natural Resources, the Colorado Wildlife Federation, the Sierra Club and National Wildlife Federation, small claimants from Utah and Colorado, large claimants from Utah and Colorado, grazing and agriculture lessees, and property taxpayers.

After an organizational period, the Committee met four times between August 1988 and February 1989. A variety of legislative proposals were considered including the 1987 House Bill, the 1988 Senate Bill and a draft bill from the U.S. Department of the Interior. Representatives of the U.S. Bureau of Land Management attended the meetings as technical advisors. The Committee was chaired by Peggy Rector, Rio Blanco County Commissioner, and staffed by myself.

By the time of the House hearing in February on H.R. 643 (now H.R. 2392), consensus existed for development of a compromise on the following issues:

- Surface Rights. The claimants were willing to relinquish the surface rights usually associated with patent title. The surface access necessary to develop the oil shale resource would be provided. This would be accomplished either through a mineral only patent, or a surface right agreement.

- Oil Shale and Associated Minerals. All parties agreed that patent or lease rights should be limited to oil shale and associated minerals (nahcolite and dawsonite) only. Rights associated with other minerals, such as coal, oil and natural gas, should remain with the United States Government.

- NEPA Requirements. All parties agreed that the National Environmental Policy Act (NEPA) and other environmental laws should apply to any oil shale development.

- Reclamation Bond Requirements. All parties basically agreed that adequate state and federal reclamation bonds are necessary. The claimants proposed that the state and federal requirements be coordinated to avoid double bonding and that the State be given primacy in the reclamation process.

The areas of substantial disagreement included the following:

- Window-of-Opportunity for Additional Patents. Whether or not claimholders with unpatented claims should have the opportunity to apply for patents was one of the key areas of disagreement. Options for a window-of-opportunity ranged from no window, to a closing date as of the date of enactment of the bill, to a one year period to file a notice of intent followed by two years to file the actual application.

- Validity Tests. Views on validity tests are interrelated with the question of whether claimants should be allowed to apply for patents. All parties agreed that validity tests should be conducted rigorously; however, the claimants indicated they would resist any new standards other than those now required by the 1872 Mining Law. Conservationists believe the standards currently being used by BLM are too lax.

- Leasing Option. All parties would either require or agree to a leasing option. The claimants agreed to such an option only if new patent applications are allowed. However, the proposed 12.5 percent royalty rate was not supported by the claimants or local governments since variable royalty rates now exist for other minerals under the Mineral Leasing Act of 1920.

- Requirements to Maintain Unpatented Claims. Disagreement exists on new requirements for maintaining or leasing an unpatented claim if there is no alternative to patent the claim. Claimants are willing, however, to have unpatented claims ruled invalid (or subject to new requirements) if applications are not filed in a one-year period from date of enactment of the bill.

COLORADO ACTIONS

Colorado's position on these oil shale claim issues is based on the belief that in many cases the surface right is now and may continue to be the valuable resource, rather than the oil shale right. Previous patents or leases account for the majority of the high quality oil shale in Colorado. We believe the state should play an active role in the management of the surface and prevent the patent of lands for purely speculative purposes.

We previously commented on H.R. 2392 and S.30, and at one point commenced legal action on this issue, because the federal agencies attempted to settle 525 claims without notice or involvement by Colorado. These actions are summarized in Appendix I.

This litigation was settled, based on voluntary surface management agreements between the state and the major claimants. The agreements request consultation with state and local governments before major land use actions and require public access for certain recreational activities.

Surface management is critical because of the ecological, biological and wildlife features of the oil shale lands. Several of the 1986 patent lands contain wildlife habitat and migration routes, riparian areas, elk calving and nursing areas, sagegrouse habitat and blue grouse winter habitat, in addition to several rare plant species.

The lands affected by H.R. 2392 and S. 30 are valuable but not critical wildlife habitat. Patenting of the surface would make it more difficult to maintain the level of protection for rare or endangered plant species that may exist on these lands, and denial of public access will hinder game management and may reduce state and local revenues from recreation. Surface patents will alter long-standing surface use arrangements.

COMMENTS ON PENDING LEGISLATION

Colorado recognizes that H.R. 2392 and S. 30 are intended to resolve the oil shale claim issues. We commend the efforts of Senator Wirth and Representative Campbell to reach a compromise. There are six major areas in both bills, which we believe need further clarification or expansion. They are:

1) Additional conditions on the transfer of surface rights for claims exempted by both bills;

2) Evaluation of all complete patent applications filed prior to January 24, 1989, for possible patent under certain conditions;

3) A redefinition of the validity criteria for the claims subject to patent;

4) An adjustment in the value of the assessment work necessary to maintain oil shale claims and in the processing fees for transfer of patents;

5) Removal of the prohibition on lease issuance for oil shale claimholders; and

6) An appropriate royalty rate for oil shale production on leased lands.

Our goal is to establish a framework that protects the rights of all affected parties.

Claims Subject to Patent

H.R. 2392, as passed in the House, adopted our recommendation to expand the definition of claims subject to the patent process to include all "complete" applications filed as of January 24, 1989. The term "complete" in this case means that all required forms and supporting documents had been filled out and filed by the applicant by January 24, 1989. The application would still be subject to a validity check, technical review, amendment and final approval by the Department.

We believe this broader definition is necessary because of the contradictory directions provided to the claimants by the Administration. The Deputy Assistant Secretary of DOI directed claimants to file applications in early 1988 while allowing the BLM self-imposed moratorium on processing applications to continue until October 1, 1988. DOI announced it would proceed with rulemaking to process the applications in December. Congressional legislation was introduced in late January. It is impossible for any applications filed in good faith in 1988 to have been finalized in the period between December 7, 1988 and January 24, 1989. The field work alone for the application review could not have begun until March of this year because of weather conditions in Northwest Colorado.

The broadening of this definition has been quite controversial. It makes as much as 50,000 acres in Colorado and Utah subject to patent rather than 12,000 acres as under the original language. Environmentalists say we are authorizing the give-away of too much; some claimants say we are denying their rights under the law. Our goal is not to defend or promote invalid claims; nor is it to continue any "fire sale" at bargain prices. However, valid oil shale claims are a vested right that should be protected.

Exempted Claims

Both S. 30 and H.R. 2392 exempt claims filed prior to February 7, 1987. Surface management agreements with the state for these claims should be stipulated by Congress in any compromise legislation. Some vested rights may prevent such a stipulation. In that case Congress could direct the Secretary and claimants to develop voluntary surface management agreements with the state upon passage of any legislation. The direction could be specific as to the issues to be addressed in the agreement, thus providing for certain land use safeguards. We also ask Congress to review the possibility of removing the surface rights from the claims exempted by S. 30 or H.R. 2392. Relinquishing the surface rights on any or all of the applications processed since 1986 would keep the valuable surface rights in the public trust.

Such agreements provide state and local involvement in surface decisions on the lands affected by H.R. 2392 and S. 30 -- control currently lacking in both bills. Current surface management agreements are a success and should be recognized in any compromise legislation.

There is an economic consequence to the surface rights issue. Patents on both surface and mineral rights will result in substantial changes in the economic benefits to local governments based on current payments in lieu of taxes. Although taxes or in lieu payments will not change, transfer of the surface rights will preclude annual rental payments of 50 cents per acre and any bonus payments from the leasing of the land. In 1974, when Federal Tracts C-a and C-b were leased, the bonus payments were $160 million. Patenting of the surface will result in higher property tax revenues to local governments only at the time of development.

Assessment Work and Patent Fee

In our testimony on then H.R. 643, we requested a review and update of the dollar value of the annual assessment work and the patent fee. As passed, H.R. 2392 requires $5,000 per claim per year in annual assessment work and $2,000 per acre patent fee. For the largest claimholder in Colorado, that will result in a cost of $20 million for patents; for the largest in Utah, it would be $34 million. In both cases, these are individuals, not major corporations.

The diligence requirements for oil shale claims are the same as those for other patentable materials pursuant to the 1872 Mining Law. Given the size of oil shale claim areas and the potential value of the resource, the 1872 values are not appropriate in 1989. However, these fees should not be set so as to prevent the patenting of valid mineral claims; nor should they be interpreted as a precedent for amendment of the 1872 Mining Law.

The $100 per claim for annual assessment work under current law may not reflect the value of the oil shale resource under claim. S. 30 proposes a $1,000 per acre annual assessment requirement. This value may be a more realistic reflection of the value of the resource under claim than the $5,000 level in H.R. 2392. A basis for this Committee to use in establishing a compromise assessment fee could be the current value of the resource -- averaging $500 to $1,500 per acre up to $2,000 per acre for the high grade shale for both surface and mineral rights. To minimize environmental disturbance, we support the concept of a payment to the Treasury in lieu of work on the ground.

The $2.50 per acre patent fee was set in 1872 to reflect the value of the government service that is provided in the patent process. Just as state government is required to readjust fees based on cost, so should the federal government. It is our recommendation that Congress direct the Secretary to establish either an average cost for such a service or a system of direct billing of the actual costs incurred by the Department for each application that is processed.

Window-of-Opportunity

The State understands the need on the part of the industry to have assurances that the patent process will move forward before the investment is made to prepare patent applications. Similarly, we recognize the position of the conservationists that it has been clear for the past two years that a patent process should be developed legislatively. For that reason, Colorado has not proposed a window-of-opportunity, only a redefinition of the claims subject to the January 24, 1989 date.

To our knowledge only Cleveland Cliffs has filed patent applications since January 24, 1989. The district BLM office reports that no patents will be issued in the near future. Of the remaining 1700 claims representing about 270,000 acres of land in Colorado and Utah that could be subject to patent, the claimants estimate that patent applications for an additional 50,000 acres would be filed if the date were extended for one year. The claimants have requested a one-year window; local governments have proposed that the cut-off date be the effective date of the legislation. The decision clearly rests with Congress.

If additional patent applications are allowed, Colorado asks that our four standards still apply. They are: 1) mandatory surface management agreements with the state for any surface rights transferred under claims exempted from the bill; 2) relinquishment of surface rights for any claims not exempted by the legislation; 3) public review and Congressional oversight of the criteria to be used by BLM to assess the validity of the claims; and 4) adjustment of the value of assessment work to maintain claims and the processing fee to issue patents.

Validity Test and Timing

It is not the intention of the State of Colorado to prevent the patenting of valid oil shale claims. However, questions continue to be raised about the validity of some claims. Colorado supported the freezes and budget moratoria on the patenting of oil shale claims until the validity question could be addressed. In documents provided by the

Bureau of Land Management (Attachment IV), it appears that the same criteria are being used as in the 1986 agreements -- criteria identified as incomplete or flawed in some previous litigation.

H.R. 2392 directs the Secretary of the Interior to undertake an expedited two year program to determine the validity of all unpatented oil shale claims affected by the legislation. We request that the criteria be set by the Secretary and be subject to Congressional overview and public review. The criteria should consider, but not be limited to, those applied to previous patents; they should also reflect issues raised in previous litigation. Paramount to this discussion is whether annual assessment work should be required since 1920, since the 1970 Supreme Court decision or since the Federal Land Policy and Management Act.

In identifying criteria for the validity test, the Secretary should consider those submitted to this Committee in the 1987 hearing on oil shale claims and the 1989 hearing on the House bill. These criteria include: discovery standards which specify the oil quantity per ton of rock at a specified seam thickness necessary to constitute an economically recoverable reserve; geologic evidence of a valuable deposit discovery prior to 1920; validity of claim as of February 25, 1920; documentation of assessment work since 1971 or 1977; evidence of abandonment; results of prior contest proceedings; fraudulent location and dummy locators; physical location on the ground; loss of interest due to adverse possession; and time limit to maintain claim prior to commencement of commercial activities.

The Secretary should consider all these concepts as an assessment of the existing criteria is made. We encourage Congressional oversight to ensure that the mistakes of past patenting efforts are not repeated. Resulting criteria should apply to all pending patent applications. It would apply also to all claims subject to conversion to lease or maintenance as claims. We also urge this Committee, or the Conference Committee, to determine if a GAO audit of previously issued patents would provide useful information on the criteria and process for future patents.

Surface Rights

As discussed earlier, the State generally does not believe that surface rights should be transferred with the oil shale patents. Current Colorado mining law guarantees surface access for development of mineral resources that have been severed from surface rights.

Oil Shale and Associated Minerals

Only those minerals associated with the oil shale strata should be patentable. Generally, nahcolite and dawsonite are found in the same geologic setting as oil shale. In the case of the applications on file, only the Marathon claims have about 40 tons of dawsonite per square mile. There does not appear to be a market for this aluminum substitute at this time. There is no nahcolite on the affected claims.

Leasing and Royalty Rate

Conversion of oil shale claims to a lease with standards comparable to other federally leasable minerals is a valid option in addition to the option to maintain claims. S. 30 stipulates a royalty rate of 12.5 percent on such leases. The state recommends that the lease rate be set at a level consistent with other leasable federal minerals with options for hardship royalty rate reductions. If the goal of leasing is development of the resource, the royalty rate in combination with the other factors of production should not make the resource uneconomic to produce.

Prohibition on Lease Issuance

S. 30 currently contains a provision which would apparently preclude issuance of any federal mineral lease to holders of oil shale claims located under the 1872 Mining Law. Normally, this type of provision is a punitive action for non-compliance with federal law. For example, under the Surface Mining and Coal Reclamation Act, lessees who are in violation of coal reclamation standards are prohibited from receiving other federal leases. Holding oil shale claims, if they are valid and maintained according to law, should not be grounds for a prohibition on other leases. This provision should not be included in any compromise legislation.

National Environmental Policy Act (NEPA)

The State believes that NEPA requirements should apply to all options outlined in H.R. 2392 and S. 30 -- patenting, leasing and maintenance of claims. Public review and comment on amendments to resource management plans (where necessary) are essential for these types of land management actions. The Colorado State BLM Office has indicated informally that it will consult with the State before the issuance of any further patents. We would prefer a more concrete commitment from the Secretary or direction from Congress.

Reclamation Bond

The state supports the reclamation requirements of H.R. 2392 and S. 30 and will work with the U.S. Bureau of Land Management to minimize duplication with State bonds and reclamation requirements.

Other Minerals

Oil, gas, coal and other minerals not associated with the oil shale strata should be excluded from the provisions of any legislation.

Agricultural Interests

The Committee should also consider the impact of development of the claims on the agriculturist. At the time at which development occurs, the holder of oil shale claims or lease should reimburse the surface lessee for the replacement value of all fences, corrals and roads disturbed or displaced by such development. Language reflecting this principle should be included in any compromise legislation.

CONCLUSION

In summary, Colorado believes that H.R. 2392 and S. 30 are good steps toward resolving the oil shale patent controversy. It is not our intent to prevent the patenting of valid oil shale claims. It is our intent, however, to limit speculation on this resource and assure Colorado's involvement in surface management decisions.

Our comments on the settlement of this issue are based on the principles involved in our litigation of the 1986 agreement between the U.S. Department of the Interior and the claimants, consistency with state and local land management practices and responsibilities, fairness in resolving the contradictory directives of Congress and Interior, acknowledgement of the principles raised in litigation of this issue since 1960 and appropriateness of the fees charged for the permanent or temporary transfer of rights to a public asset.

Oil shale has both a long-term strategic value as a fuel for the country and short-term economic value as an industrial byproduct. It is our intention to work with the industry, local governments, conservationists, agriculturists, Congress and the Department of the Interior to reach a compromise that allows oil shale to be developed in a timely, environmentally responsible and competitive manner, while allowing the State of Colorado to continue its resource management responsibilities.

Thank you for the opportunity to speak to you today. I would be pleased to answer any questions.

6831A

STATE OF COLORADO ROY ROMER, Governor
DEPARTMENT OF NATURAL RESOURCES
HAMLET J. BARRY III, Executive Director
1313 Sherman St, Room 718, Denver, Colorado 80203 866-3311

Geological Survey
Board of Land Commissioners
Mined Land Reclamation
Division of Mines
Oil and Gas Conservation Commission
Division of Parks & Outdoor Recreation
Soil Conservation Board
Water Conservation Board
Division of Water Resources
Division of Wildlife

APPENDIX I

Summary of Litigation and Surface Management Agreements by the State of Colorado in the Settlement of 1986 Oil Shale Patents

In 1986 the Department of the Interior patented 525 oil shale claims in Colorado, Utah and Wyoming covering 82,000 acres of land. Colorado, which had various surface management responsibilities on those lands, was not a participant in the patent process, or in the related agreements between Interior and the claimants. These special agreements, affecting land use and the surface and mineral rights that were transferred, were a compromise between the claimants and the federal government on the rights so transferred. They mooted appeal of Judge Finesilver's 1985 decision. The settlement transferred oil shale, sand and gravel rights, but reserved to the United States oil, gas and coal ownership, as well as some surface control for a limited time (20 years). The settlement, however, did not explicitly address the validity of the claims even though allegations had been made in prior litigation that as much as 202 of the 525 claims may have been invalid.

Litigation

Colorado had concerns about the terms of the special agreements because they did not protect Colorado's interest, especially in the management of the surface. Specifically, when the federal government entered into private negotiations with the claimants without public participation, it violated its trust responsibilities to the state. As a result, the state filed a motion to intervene in Tosco v Hodel and Ertl v Hodel in the Tenth Circuit Court of Appeals. The motions were denied based on a lack of jurisdiction which was mooted by the settlement agreement.

Colorado then filed a complaint in the Washington D.C. Federal District Court challenging the validity of the oil shale agreement executed by the United States. This case was transferred to the Federal District Court in Colorado and was heard by Judge Finesilver. The case was dismissed without prejudice for failure to join all indispensable parties (oil shale claimants). No ruling was made on the merits of the case.

The basis of our legal intervention was twofold. First, it is our belief that a special agreement of this type that goes beyond the normal federal patent process is subject to the provisions of the Federal Land Policy and Management Act (FLPMA) of 1976. This law requires public participation, a 60-day gubernatorial review period before any agreement is finalized, and congressional authorization of land transfers of over 2,500 acres. In this particular case, various public groups are affected by the decision: local governments, hunters, ranchers, farmers, recreationists and other potential developers -- none of whom were consulted in this process.

Second, it is also our belief that a land transfer of this magnitude is subject to the provisions of the National Environmental Policy Act, which requires either an environmental impact statement or a refinement of the existing statements and management plans currently in place to apply specifically to the 82,000 acres. Finally, the agreements did not provide for oversight provisions in the implementation of the settlement -- including a review in 20 years before the final surface transfer is made.

State Settlement

To assure that Colorado's surface management interests are recognized, the Romer Administration began negotiations with the principal claimants in February, 1987 to prepare voluntary surface management agreements that would guide the surface use of the patented lands until such time as oil shale development commenced. These agreements are restrictive covenants that go with the land and are recorded as documents affecting title. They serve as a matter of record describing the unique biological, ecological and wildlife features of the tracts which will be useful at the time environmental impact statements are prepared prior to the development of the resource. These agreements will be superceded by state mined land reclamation laws when development begins. To date, Colorado has reached agreement with Shell Oil, Ertl Trust, Union Oil and Tosco Corporation. A final agreement is pending with Exxon and Weber Oil.

These surface management agreements address public access for hunting and fishing and consultation with the state for timbering, grazing, spraying, burning and other land management activities. The agreements identify areas and species of geological, ecological and biological significance that are unique and should be either designated as Colorado Natural Areas or identified for protection at a later date. The agreements also address compliance with state and local land use laws and consultation with the state on road closures, location of transmission and power lines, and other surface disturbances. These surface management agreements are the primary component of Colorado's settlement on the oil shale litigation.

STATE OF COLORADO ROY ROMER, Governor
DEPARTMENT OF NATURAL RESOURC
1313 Sherman St., Room 718, Denver, Colorado 80203 866-3311

Division of Mines
Oil and Gas Conservation Commission
Division of Parks & Outdoor Recreation
Soil Conservation Board
Water Conservation Board
Division of Water Resources
Division of Wildlife

ATTACHMENT I

TESTIMONY FOR THE
SENATE SUBCOMMITTEE ON MINERAL RESOURCE
DEVELOPMENT AND PRODUCTION
BY
RONALD W. CATTANY
ACTING DEPUTY DIRECTOR
COLORADO DEPARTMENT OF NATURAL RESOURCES

OCTOBER 16, 1987

Thank you Mr. Chairman. I appreciate the invitation by Senator Wirth and his staff to participate in this hearing. Let me summarize the detailed testimony I have provided and move to questions. I request the full statement and support document be included in the record.

Colorado welcomes the opportunity to comment on both the process and the substance of the settlement of oil shale claims in Northwest Colorado. The settlement of these claims is important not only to the companies and individuals wishing to invest in Northwest Colorado, but also to the local governments who derive revenues from these projects. Our involvement in this effort over the past 15 months has been to assure that Colorado's interests are protected in both the management and disposition of its natural resources.

In general, Colorado's concerns center on three major issues:

1) Full disclosure by the Department of the Interior on the process to be used to settle the patent issue;

2) Recognition of the interests of the state and other affected parties in decisions of this magnitude; and

3) Receipt of fair market value for lands removed from the public trust.

In 1986, the State of Colorado filed a motion to intervene in the United States District Court and the U.S. Court of Appeals in the settlement of oil shale claims in Northwest Colorado. Colorado also filed a motion for a preliminary injunction so that our position could be heard before any settlements were implemented.

We found it especially troublesome that neither the State of Colorado, local governments in Northwest Colorado nor the private parties affected by the settlement were consulted prior to the agreement that was reached between the Department of the Interior and the claimants on August 4, 1986. The state's first glimpse of the agreement came after it was signed, from the press.

It is the belief of the State of Colorado that the federal government represented the interest of the state during the litigation process over the past 25 years by arguing that keeping the resources under federal control was in the public interest. When the federal government entered into private negotiations with the claimants without public participation, it violated that trust and responsibility.

Further, it is our belief that a sale of land of this magnitude is subject to the provisions of the Federal Land Policy Management Act of 1976. This law requires public participation, a 60-day gubernatorial review period before any agreement is finalized, and congressional authorization of land transfers of over 2,500 acres. In this particular case, various public groups are affected by the decision: local governments, hunters, ranchers, farmers, recreationists and other potential developers, none of whom were consulted in this process. It is also our belief that a land transfer of this magnitude may also be subject to the provisions of the National Environmental Policy Act, which requires either an environmental impact statement or a refinement of the existing statements and management plans currently in place to apply specifically to these 82,000 acres.

It is not the intention of the State of Colorado to prevent the patenting of valid oil shale claims. Those claimants who have satisfied the patent process outlined in the 1872 Mining Law are legally entitled to such patents. However, questions continue to be raised about the validity of some claims. For this reason, Colorado supported the initial freeze on the patenting of oil shale claims proposed in 1986 by Senators Melcher and Hart until the question of validity was resolved.

The State of Colorado concedes that the Interior agreement is a quantum leap beyond the conservative interpretation of the law exemplified in Judge Finesilver's 1985 decision, which granted all surface and mineral rights to the claimants. However, the transfer of surface rights to the oil shale claimants for unrestricted use at the end of a 20-year period is inconsistent with the intention of obtaining mining claims for the purpose of mineral development. This precedent encourages acquisition of public lands for speculative purposes.

At this time, the state has no preference between leasing the land for future oil shale development or patenting valid oil shale claims. The current value of the property would not result in substantial changes in the economic benefits to local governments. Based on current tax levels, the counties estimate that the tax revenues would differ from current payments in lieu of taxes by only $500.

The remainder of the revenue issues have not been addressed to date. Privatization of the land would preclude annual rental payments and any bonus payments from the leasing of the land. At $0.50 per acre, the state would lose $20,000 annually on its share of rental payments if the 82,000 acres were patented instead of leased. In 1974, when Federal Tracts C-a and C-b were leased, the bonus payments were valued at over $160 million for a total of 10,240 acres.

The failure to involve the state in the initial agreement has necessitated an inconvenient and cumbersome arrangement that involves a second tier of agreements. As a result of our intervention into the settlement process, the State of Colorado has begun negotiations to enter into surface management agreements with the claimants to provide restrictive covenants that would go with the land and be recorded as documents affecting title. Such an agreement would be in effect until the time that resource development occurs and would guarantee continued access by the state for the purposes of natural resource management. At that time, surface management decisions would be subject to the Colorado Mined Land Reclamation Act, local land use regulations and special use permits.

Surface management agreements are critical because of the unique ecological, biological and wildlife features of these lands. The oil shale claims settlement could affect habitats for several plant species which are candidates for listing as threatened or endangered by the U.S. Fish and Wildlife Service. In addition, the parcels contain several rare plant species which are on the Colorado Natural Areas Inventory list of plants species of special concern to Colorado. Privatization of this land makes it more difficult to maintain the level of protection that exists under public ownership.

The area has significant wildlife potential as well. The Colorado Division of Wildlife calculates that as many as 24,000 recreation days could be lost at a cost of $2.5 million and that approximately 50 percent of the harvest might not be achieved if access is restricted or denied.

Additionally, the Division of Wildlife has classified summer range in this area as critical habitat for elk. Several of the patent lands contain wildlife habitat, wildlife migration routes, riparian areas, elk calving and nursing areas, sagegrouse habitat and blue grouse winter habitat.

North Cathedral Bluffs contains a full spectrum of mid- to high-elevation vegetation, aquatic and geologic features and spectacular scenic values representative of the northwest part of the Piceance Basin and should be designated a Colorado Natural Area.

Future federal management and disposition of oil shale lands should be guided by three principles:

1. Management by either lease or patent in a manner that encourages the development of the resource;

2. Management of the resource in a manner that guarantees access in time of national need (to avoid the need for an Energy Mobilization Board); and

3. Disposition of the property in a manner that provides a reasonable return to the federal government.

The market values of the land affected by the decision range from $700 to $1,500 per acre ($400 for non-irrigated land and $1,500 for irrigated land). Under the current patenting procedures, the federal government is not realizing fair market value for these lands. Placing the value on 1872 prices undervalues the resource and places patenting at competitive revenue disadvantage to leasing. However, in soft markets as today's energy market, dependence solely on a leasing system may preclude any activity and related revenues due to lack of demand for the resource.

In summary, Colorado's concerns on this issue have not been with the companies but rather with the federal government. It is not our intent to prevent the patenting of valid oil shale claims, nor is it our intent to dictate whether oil shale lands should be leased or patented. It is our intent to assure Colorado's place at the decision table.

Oil shale has both a long-term strategic value to the country and short-term economic uses such as high-grade asphalt. Colorado supports the oil shale industry in Colorado and is appreciative of the efforts of Representative Ben Nighthorse Campbell and Senators Tim Wirth and Jake Garn to carry legislation this session to establish an economic enhancement program for western oil shale. It is our intention to work with the industry, Congress and the Department of Interior to reach a compromise that allows oil shale to be developed in a timely and competitive manner, while allowing the State of Colorado to continue its resource management responsibilities.

Thank you for the opportunity to appear before you today. I would be pleased to answer any questions.

7866A

Questions Related to State Testimony

1. What are the unanswered questions that Colorado feels have been raised by this type of process and settlement?

   - This process ignores the public review procedures established in federal law.

   - The agreement fails to recognize the needs of the various parties affected.

   - The result establishes serious precedents for future public land management issues, specifically:

     - Removal of land from public trust (and precluding multiple uses of the land not envisioned in 1872 or 1920)

     - Maximum return on the assets of the public trust (including the long term value of oil shale compared with a $2.50 patent fee today)

     - Representation of state interests

     - Unrestricted latitude in future land cases (not consistent with the philosophy of acquiring mineral patents)

     - Impacts on farming, ranching and hunting (including posting the land, renegotiating leases with new owners and higher lease fees)

     - Federal land use preemption - local control vs. Energy Mobilization Board especially with regard to air quality, water quality and reclamation

     - Lack of economic impact analysis - we don't know if this is a good deal for Colorado

     - Lack of oversight provisions in the implementation of the settlement - including a review in 20 years before the final transfer is made

2. What are the specific elements of the surface management agreements that Colorado is proposing? Is the agreement mandatory?

   Provisions of the proposed voluntary agreement include 12 simple, sound resource management principles:

   - Compliance with existing land use laws

   - Simple annual report outlining proposed land use changes

- Minimization of traffic impacts on wildlife
- Restrictions on the use of firearms
- State consent for spraying and burning
- Establishment of grazing standards
- Consultation on forest management
- Protection, mitigation or replacement of riparian areas affected by development
- Free access for hunting
- Restrictions on road closures
- Protection of areas of scenic beauty or natural significance

These principles are consistent with existing land use controls at the local level in Colorado.

3. What is the status of the state's negotiations with the companies? Have there been complications?

Current negotiations:	Ertl Shell - new operator since 17,000 acres of Ertl land was sold.
Ready to finalize:	UNOCAL
Pending:	Exxon Tosco Attorney for several small individual claimants

The Ertl Trust initiated the process and has encouraged other companies to enter into similar agreements.

Complications:

1) Paraho Corporation asphalt project delayed pending clear title to land affected by Colorado suit

2) Ertl sale to TOSCO - 15,000 acres sold for $250 per acre based on a 1963 agreement

3) Ertl sale of 17,000 acres to Shell Oil for $34 million

4. Has there been any effort on the part of the Department of Interior to involve the state in future patents?

Colorado state office is helpful and provides notification when it can. No communication from Washington which has encouraged expediency and secrecy in issuance of patents.

Last spring, the Justice Department advanced a proposal to the Deputy State Attorney General that would provide prior notification of patenting of future claims, including a 60-day gubernatorial review period for future patents. The condition for this accomodation was that the state drop its legal actions and agree not to testify on any proposed oil shale legislation. This was to be an agreement between the Reagan Administration and the State of Colorado. Upon follow-up this summer with the Justice Department on this proposal, the Deputy State Attorney General was told that Interior was less than enthusiastic about entering into such an agreement and that the Justice Department was not anxious to bring the concept up again.

7866A

Senate hears about 'deal' on shale land

By JOAN LOWY
Rocky Mountain News Washington Bureau

WASHINGTON — The Justice Department tried to prevent Colorado officials from testifying before Congress on legislation to stop the federal government from turning over western oil-shale lands for $2.50 an acre, a state official told a Senate panel yesterday.

A Justice official offered to give the state a bigger say in what happened to Colorado oil-shale lands if the state agreed to drop legal action involving the acreage and promised not to testify, said Ronald Cattany, the Colorado Department of Natural Resources' assistant director.

Cattany's remarks to the Senate energy and natural resources' subcommittee on natural resources development and production surprised Sen. Tim Wirth, D-Colo., the only member of the panel present at the time, and the handful of observers attending the hearing.

"It sounds to me that that is totally inappropriate . . . it is ridiculous . . . it is almost coercive," Wirth said. "This gets fishier all the time."

The issue stems from an agreement reached secretly between the Reagan administration and claimants to 82,000 acres of prime oil-shale lands in Colorado in August 1986 to settle a longstanding lawsuit.

The government agreed to turn over ownership of the lands at $2.50 an acre — in accordance with an 1872 federal mining law — in exchange for certain concessions by the claimants.

The agreement, which was first made public in articles published by the *Rocky Mountain News*, drew criticism from congressional Democrats that the administration was "giving away" public lands that could be worth billions of dollars. Estimates of the value range from $500 to $2,000 an acre.

See OIL SHALE, next page

OIL SHALE

from previous page

The settlement could end up applying to about 273,000 acres of prime oil-shale lands in Colorado, Wyoming and Utah.

Cattany said the Reagan administration's offer would have given the state 60 days' notice before the Interior Department issued any "patents," or ownership, of oil-shale lands to private claimants.

The state filed a lawsuit against the Interior Department last December asking to be including in any agreements with private oil-shale claimants — most of whom are large oil companies — that involve land use restrictions. That suit would have been dropped under the offer.

Wirth asked Cattany to givethe committee written details of the Justice Department's proposal, including when it was made and by whom.

Cattany identified Larry McBride, the assistant chief of the Justice Department's general litigation section/land and natural resources division, as the official who made the offer.

McBride, who was contacted afterward by the *News*, said, "I did have discussions with (former Colorado deputy attorney general) Jan Miller, but the substance of those discussions is not something on which I'll comment."

ROCKY MOUNTAIN NEWS
October 17, 1987

Coloradan says Reagan violated law on shale deal

By Gary Schmitz
Denver Post Washington Bureau

WASHINGTON — The Reagan administration violated federal law when it turned over vast areas of federal oil shale lands to private interests last year, a Colorado official charged Friday.

Ron Cattany, deputy director of the Colorado Department of Natural Resources, testified that federal land policies demand consultation with state agencies and a 60-day delay before large tracts of public land be sold or transferred.

A formal environmental study also should have been performed, he said.

Instead, the Interior Department negotiated secretly with holders of shale claims, and state officials were startled to learn of the controversial deal.

"The state's first glimpse of the agreement came after it was signed, from the press," Cattany said during a hearing of the U.S. Senate Energy Subcommittee on Mineral Resources.

In addition, Cattany alleged that when state officials asked that they be given advance notice of additional shale land transfers, as required by law, the Justice Department responded with an offer that bordered on blackmail.

A Justice Department official indicated his agency would comply with the request only if the state first dropped a lawsuit filed to protect state interests in the shale dispute, Cattany said.

The state further would have had to promise not to testify in Congress against the administration's shale land actions, he added.

The state never consented to that arrangement, Cattany said.

Friday's hearing focused on legislation by Rep. Ben Nighthorse Campbell, D-Ignacio, that would restrict future sales of federal shale property.

The legislation was introduced in the wake of the Interior Department's August 1986 decision to end its long legal challenge of oil shale claims, and to dispose of 82,000 acres of Colorado shale lands in an out-of-court settlement, for a mere $2.50 an acre.

THE DENVER POST
October 17, 1987

ATTACHMENT II

STATE OF COLORADO ROY ROMER, Governor
DEPARTMENT OF NATURAL RESOURC
HAMLET J. BARRY III, Executive Director
1313 Sherman St., Room 718, Denver, Colorado 80203 866-3311

Division of Mines
Oil and Gas Conservation Commission
Division of Parks & Outdoor Recreation
Soil Conservation Board
Water Conservation Board
Division of Water Resources
Division of Wildlife

TESTIMONY FOR THE
HOUSE SUBCOMMITTEE ON MINING AND NATURAL RESOURCES
BY
RONALD W. CATTANY
ASSISTANT DIRECTOR
COLORADO DEPARTMENT OF NATURAL RESOURCES

FEBRUARY 28, 1989

Mr. Chairman, thank you. I appreciate the invitation by your staff to participate in this hearing. I am testifying today on behalf of Governor Roy Romer of Colorado. I request that this statement and accompanying support documents be included in the record. They include 1987 testimony on behalf of Colorado before the Senate Subcommittee on Mineral Resource Development and Production (Attachment I), our analysis of the impacts of the patents issued in 1986 (Attachment II) and the current Bureau of Land Management (BLM) standards for validating oil shale claims.

Colorado welcomes the opportunity to comment on both the process and the substance of the settlement of oil shale claims in Northwest Colorado. The settlement of these claims is important not only to the companies and individuals wishing to invest in Northwest Colorado, but also to the local governments who derive revenues from these projects and to the public who use these lands for recreation and agriculture. While the state does not have direct jurisdiction over this issue, our objective over the past two and a half years has been to assure that a wide range of interests are considered in both the management and the disposition of our natural resources.

In general, Colorado supports the basic provisions of H.R. 643. However, there are four major areas of the bill which we believe need further clarification or expansion. They are:

1) Additional conditions on the transfer of surface rights for claims exempted by this bill;

2) Evaluation of the remaining patent applications filed prior to January 24, 1989 and possible patent under certain conditions;

3) A redefinition of the validity criteria for the claims subject to patent, which will reflect the standards in existing law and the issues raised in previous litigation of the oil shale claims; and

4) An adjustment in the value of the assessment work necessary to maintain oil shale claims to reflect the value of the resource under claim and in the processing fees for transfer of patents which reflects the cost of the government services required to complete the transaction.

Our comments in these areas are based on the principles of our litigaton of the 1986 agreement between the U.S. Department of the Interior (DOI) and the claimants, consistency with state and local land management practices and responsibilities, fairness in resolving the contradictory directives of Congress and DOI, acknowledgement of the principles raised in litigation of this issue since 1960, and appropriateness of the fees charged for the permanent or temporary transfer of rights to a public asset.

Our comments today are also based on the belief that in many cases the surface right may ultimately be the valuable resource, not necessarily the oil shale right. Previous patents or leases account for the majority of the high quality oil shale. Therefore, it is our intent to have the state play an active role in the management of the surface.

To put into context my specific comments on H.R. 643, let me summarize the actions of the state since 1986.

BACKGROUND

In 1986 525 oil shale claims were patented in the states of Colorado, Utah and Wyoming covering 82,000 acres of land. Colorado, which had various surface management responsibilities on those lands, was not a participant in the patent process, or in the related agreements between DOI and the claimants. These special agreements, affecting land use and the surface and mineral rights that were transferred, were a compromise between the claimants and the federal government on the rights so transferred. They mooted appeal of Judge Finesilver's 1985 decision. The settlement transferred oil shale, sand and gravel rights, but reserved to the United States oil, gas and coal ownership, as well as some surface control for a limited time (20 years). The settlement, however, did not explicitly address the validity of the claims even though allegations had been made in prior litigation that as much as 202 of the 525 claims may have been invalid.

LITIGATION

Colorado had concerns about the terms of the special agreements because they did not protect Colorado's interest, especially in the management of the surface. Specifically, when the federal government entered into private negotiations with the claimants without public participation, it violated its trust responsibilities to the state. As a result, the state filed a motion to intervene in Tosco v Hodel and Ertl v Hodel in the Tenth Circuit Court of Appeals. The motions were denied based on a lack of jurisdiction which was mooted by the settlement agreement. Colorado then filed a complaint in the Washington D.C. Federal District Court challenging the validity of the oil shale agreement executed by the United States. This case was transferred to the Federal District Court in Colorado and was heard by Judge Finesilver. The case was dismissed without prejudice for failure to join all indispenable parties (oil shale claimants). No ruling was made on the merits of the case.

The basis of our legal intervention was twofold. First, it is our belief that a special agreement of this type that goes beyond the normal federal patent process is subject to the provisions of the Federal Land Policy and Management Act (FLPMA) of 1976. This law requires public participation, a 60-day gubernatorial review period before any agreement is finalized, and congressional authorization of land transfers of over 2,500 acres. In this particular case, various public groups are affected by the decision: local governments, hunters, ranchers, farmers, recreationists and other potential developers -- none of whom were consulted in this process. Second, it is also our belief that a land transfer of this magnitude is subject to the provisions of the National Environmental Policy Act, which requires either an environmental impact statement or a refinement of the existing statements and management plans currently in place to apply specifically to the 82,000 acres. Finally, the agreements did not provide for oversight provisions in the implementation of the settlement -- including a review in 20 years before the final surface transfer is made.

No decision on the specific merits of Colorado's case has been made, and we continue to advocate our legitimate interest in the settlement of the issue.

STATE SETTLEMENT

To assure that Colorado's surface management interests are recognized, the Romer Administration began negotiations with the principal claimants in February, 1987 to prepare voluntary surface management agreements that would guide the surface use of the patented lands until such time as oil shale development commenced. These agreements are restrictive covenants that go with the land and are recorded as documents affecting title. They serve as a matter of record describing the unique biological, ecological and wildlife features of the tracts which will be useful at the time environmental impact statements are prepared prior to the development of the resource. These agreements will be superceded by state mined land reclamation laws when development begins. To date, Colorado has reached agreement with Shell Oil, Ertl Trust, Union Oil and Tosco Corporation. A final agreement is pending with Exxon and Weber Oil.

These surface management agreements address public access for hunting and fishing and consultation with the state for timbering, grazing, spraying, burning and other land management activities. The agreements identify areas and species of geological, ecological and biological significance that are unique and should be either designated as Colorado Natural Areas or identified for protection at a later date. The agreements also address compliance with state and local land use laws and consultation with the state on road closures, location of transmission and power lines, and other surface disturbances. These surface management agreements are the primary component of Colorado's settlement on the oil shale litigation.

Surface management is critical because of the ecological, biological and wildlife features of these lands. Several of the 1986 patent lands contain wildlife habitat and migration routes, riparian areas, elk calving and nursing areas, sagegrouse habitat and blue grouse winter habitat in addition to several rare plant species. The lands affected by H.R. 643 are valuable but not critical wildlife habitat. There may be 3 to 4 plant species in the area which are proposed for listing by the U.S. Fish and Wildlife Service as threatenend or endangered. There are also 2 to 3 plant species rare to the state that may also exist in the area. Therefore, privatization of the surface rights makes it more difficult to maintain the level of protection that exists under public ownership. In addition, denial of public access will hinder game management through harvesting and may reduce state and local revenues from recreation.

COMMENTS ON H.R. 643

Future federal management and disposition of oil shale claims should be guided by the comments outlined at the beginning of this testimony. With these in mind, I would like to comment on the provisions of H.R. 643.

Claims Applicable for Patent

The state understands the need on the part of the industry to have assurances that the patent process will move forward before the investment is made to prepare patent applications. Similarly, we recognize the position of the conservationists that it has been clear for the past two years that a patent process would be developed legislatively. Anticipating this pending action, the Deputy Assistant Secretary of DOI directed claimants to file applications in early 1988 while allowing the BLM self-imposed moratorium on processing applications to continue until October 1, 1988. DOI announced it would proceed with rulemaking to process the applications in December. Finally, we are also aware of the difficulties and delays in processing the applications within BLM. There are 1575 claims representing about 250,000 acres of land in Colorado and Utah that are subject to patent.

H.R. 643 currently allows only those applications for which all requirements have been satisfied to be patented. This would affect about 12,000 acres of surface and oil shale rights, but deny the option of patents to those claimants whose applications may have been filed in 1988 but which were not reviewed, amended and approved by January 24, 1989.

Under certain conditions, the state is willing to support a more liberal provision while still limiting the total lands subject to transfer.

We propose that no claims be subject to patent except those for which a "complete" application had been filed with the Secretary of the Interior prior to January 24, 1989. The term "complete" in this case would mean that all required forms and supporting documents had been filled out and filed by the applicant by January 24, 1989. The application is still subject to technical review, amendment and final approval by the Department.

There are four conditions on this more liberal interpretation for obtaining oil shale patents: 1) mandatory surface management agreements (as described above) with the state for any surface rights transferred under claims exempted from the current provisions of H.R. 643; 2) relinquishment of surface rights for those claims whose complete application is still pending final review and approval; 3) public review and possible congressional oversight of the validity criteria currently used by BLM; and 4) adjustment of the value of assessment work to maintain claims, and of processing fees to issue patents.

Given the fact that most of the high quality federal oil shale was patented in 1986 or leased in the 1970's, it is our belief the associated surface rights on the remaining claims may be the resource of value. Therefore, any congressional legislation must address the importance of this resource. Surface use agreements on the exempted claims could be stipulated by Congress in the Act. Because some vested rights may prevent such a stipulation, Congress could direct the Secretary and claimants to work out acceptable surface management practices with the state prior to development. The direction could be specific as to the categories of issues to be addressed in the agreement, thus providing for certain land use safeguards. We also ask Congress to review the possibility of removing the surface rights from the claims exempted by this bill. Relinquishing the surface rights on any or all of the applications filed before January 24, 1989 would keep the valuable surface rights in the public trust.

We believe that the broader definition of complete application is necessary because of the mixed signals given by Congress and Interior to the claimants over the past year. After the December directive to resume the patent process, it would have been impossible for any applications filed in good faith in 1988 to be finalized and patents issued prior to January 24, 1989. The field work alone for the application review can not begin until March of this year because of weather conditions in Northwest Colorado.

Under our proposal, final issuance of patents is still subject to successful completion of all patent requirements. This proposal makes about 25,000 acres in both Colorado and Utah subject to patent. Patents will issue only if validity is proven. The January 24, 1989 date would, however, prevent the filing of additional applications for purely speculative purposes.

This proposal has been quite controversial. Environmentalists say we are authorizing the give-a-way of too much; some claimants say we are denying their legal rights under the law.

While we may not have agreed that DOI should have directed interested claimants to file applications in 1988 prior to a resolution by Congress, the suggestion was made, and some claimants filed in good faith expecting due process. Congress can respond in two ways. It can reverse the recommendation of DOI. Or it can enact rigorous requirements to assure that any claims subject to patent are valid, associated fees are in today's dollars and only limited rights are transferred. A reversal will only continue the series of contradictory directives that have characterized this issue since 1920, probably resulting in more litigation.

Our goal is not to defend or promote invalid claims; nor is it to continue any "fire sale" at bargain prices. Valid oil shale claims are a vested right and the processing fee is not intended to reflect the value of the land. We are saying, however, that any legislation should reflect the realities of Congressional actions and the directives of Administration officials. In addition, our proposal will provide state surface management on the claims currently exempted from H.R. 643 -- control currently lacking in the bill. Surface management agreements were an environmental success resulting from our litigation and should be incorporated in the current bill. If Congress does not address this issue, the state will again pursue voluntary agreements with claimants.

There is also an economic consequence to the surface rights issue. Patents on both surface and mineral rights will result in substantial changes in the economic benefits to local governments based on current payments in lieu of taxes. Although taxes or in lieu payments will not change, transfer of the surface rights will preclude annual rental payments of 50¢ per acre and any bonus payments from the leasing of the land. In 1974, when Federal Tracts C-a and C-b were leased, the bonus payments were $160 million. Surface right transfer will result in higher property tax revenues to local governments only at the time of development.

Requirements to Maintain Claims and Transfer Fees

The diligence requirements for oil shale claims are the same as those for other patentable materials pursuant to the 1872 Mining Law. H.R. 643 gives the Secretary the authority to set an annual expenditure requirement by rule. Given the size of oil shale claim areas, we fully support congressional review of the dollar value of assessment work necessary to maintain claims, and the amount of the patent fee. This should not be construed to prevent the patenting of valid mineral claims, or as favoring a particular rate, or advocating general amendments to the 1872 Mining Law.

The fees for maintenance of claims and transfer of surface rights should reflect the value of the resource that has been claimed. The $100 per claim for assessment work and $2.50 per acre processing fee for surface rights clearly do not reflect the value of the oil shale resource or the cost of handling the applications. Even though surface rights would be transferred on those applications filed prior to January 24, 1989 as the Act is now written, that should not preclude Congressional review of the cost of the transfer of surface rights on those claims.

Validity Test and Timing

It is not the intention of the State of Colorado to prevent the patenting of valid oil shale claims. However, questions continue to be raised about the validity of some claims. Colorado supported the freezes and budget moratoria on the patenting of oil shale claims until the validity question could be adressed. In documents provided by the Bureau of Land Management (Attachment III), it appears that the same criteria are being used as in the 1986 agreements -- criteria identified as incomplete or flawed in some previous litigation.

H.R. 643 directs the Secretary of the Interior to undertake an expedited two year program to determine the validity of all unpatented oil shale claims affected by the legislation. Therefore, the criteria set by the Secretary to determine validity should be subject to public review and comment. The criteria should consider, but not be limited to, those applied to previous patents; they should also reflect issues raised in previous litigation.

In identifying criteria for the validity test, the Secretary should consider: discovery standards which specify the oil quantity per ton of rock at a specified seam thickness necessary to constitute an economically recoverable reserve; geologic evidence of a valuable deposit discovery prior to 1920; validity of claim as of February 25, 1920; history of assessment work and challenges to claims prior to 1970; criteria that would constitute abandonment based on lack of assessment work thereafter; invalidity criteria based on prior contest proceedings, fraudulent location, and dummy co-locators; physical location of claims on the ground given weather, terrain and access conditions; loss of interest in claim as a result of adverse possession; and time limit to maintain claim prior to commencement of commercial activities.

As this criteria is developed, we encourage Congressional oversight to ensure that the mistakes of past patenting efforts are not repeated. Resulting criteria should apply to those patent applications pending as of January 24, 1989 for which the current review process has not yet been completed. It would apply also to all claims subject to conversion to lease or maintenance as claims.

Surface Rights

As discussed earlier, the state generally does not believe that surface rights should be transferred with the oil shale patents. Current mining law guarantees surface access for development of mineral resources without transferring surface rights.

Oil Shale and Associated Minerals

Only those minerals associated with the oil shale strata should be patentable. Generally, nacholite and dawsonite are found in the same geologic setting as oil shale. In the case of the applications on file, only the Marathon claims have about 40 tons of dawsonite per square mile. There does not appear to be a market for this aluminum substitute at this time. There is no nahcolite on the affected claims.

Leasing

Conversion of oil shale claims to a lease with standards comparable to other federally leasable minerals is a valid option in addition to the option to maintain claims. S. 30 stipulates a royalty rate of 12.5 percent on such leases. The state recommends that the lease rate be set at a level consistent with other leasable federal minerals with options for hardship royalty rate reductions. If the goal of leasing is development of the resource, the royalty rate in combination with the other factors of production should not make the resource uneconomic to produce.

National Environmental Policy Act (NEPA)

The state believes that NEPA requirements should apply to all options outlined in H.R. 643 and S. 30 -- patenting, leasing and maintenance of claims. This has been evidenced by our previous legal actions on the 1986 agreements. Public review and comment on amendments to resource management plans (where necessary) are essential for these types of land management actions. The Colorado State BLM Office has indicated informally that it will consult with the state before the issuance of any further patents. We would prefer a more concrete commitment from the Secretary or direction from Congress.

Reclamation Bond

The state supports the reclamation requirements of H.R. 643 and S. 30 and will work with the U.S. Bureau of Land Management to minimize duplication with state bonds and reclamation requirements.

Other Minerals

Oil, gas, coal and other minerals not associated with the oil shale strata should be excluded from the provisions of this bill.

Agricultural Interests

The Committee should also consider the impact of development of the claims on the agriculturist. At the time at which development occurs, the holder of oil shale claims or lease should reimburse the surface lessee for the replacement value of all fences, corrals and roads disturbed or displaced by such development. Language reflecting this principle should be added to the bill.

CONCLUSION

In summary, Colorado believes that H.R. 643 is a good step toward resolving the oil shale patent controversy. It is not our intent to prevent the patenting of valid oil shale claims. It is our intent, however, to limit speculation on this resource and assure Colorado's place at the table for surface management decisions. Through the experience of our oil shale agreements, we have shown that environmental concerns can be brought to the table in the patenting of oil shale claims.

Oil shale has both a long-term strategic value as a fuel for the country and short- term economic value as an industrial by-product. It is our intention to work with the industry, local governments, conservationists, agriclturists, Congress and the Department of Interior to reach a compromise that allows oil shale to be developed in a timely, environmentally responsible and competitive manner, while allowing the State of Colorado to continue its resource management responsibilities.

Thank you for the opportunity to speak to you today. I would be pleased to answer any questions.

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ATTACHMENT III

STATE OF COLORADO ROY ROMER, Governor
DEPARTMENT OF NATURAL RESOURC
1313 Sherman St., Room 718, Denver, Colorado 80203 866-3311

Division of Mines
Oil and Gas Conservation Commission
Division of Parks & Outdoor Recreation
Soil Conservation Board
Water Conservation Board
Division of Water Resources
Division of Wildlife

OIL SHALE CLAIMS IN NORTHWEST COLORADO

Bureau of Land Management Settlement
State of Colorado Analysis
October 1987

Overview

On August 4, 1986, the Bureau of Land Management and the Department of Interior reached agreement on the settlement of 525 unpatented oil shale placer mining claims affecting 82,000 acres in the Green River formation of Colorado. These claims are held by numerous oil companies, firms and individuals. In total, there are over 2300 claims on 360,000 acres of federal land in Colorado, Utah and Wyoming which could be affected by this settlement. In this settlement, 43,640 acres are in Rio Blanco County and 36,360 acres are in Garfield County. Map 1 identifies the claim areas.

The agreement settles claims that were made prior to 1920 under the 1872 Mining Law. That law outlines certain due diligence requirements and could lead to a patent of the mineral right for a $2.50 fee. At this rate, the 82,000 acres of land in the decision would yield $205,000 to the federal government. The land has been appraised by the counties at $5 - $10 an acre. The oil shale rights have also been assessed in that range. The market values of the lands in the area range from $700 to $1500 per acre.

After the passage of the Mineral Leasing Act of 1920, similar lands were made available for leasing only. A leasing action generates revenues from bonus payments on the lease bid, annual rent payments and royalty payments on mineral production. These revenues are shared 50-50 with state and local governments. The allocation of those monies within the state is set by the legislature.

From 1920 until today, a variety of decisions by the Department of Interior and the courts have affected these claims. In the 1930's, the Government Land Office, the predecessor of BLM, withdrew much of the shale lands and declared many of the oil shale claims void for a variety of reasons, including the failure to perform required diligence work or failure to register the claims properly. In the 1940's and 1950's, speculators bought many of the claims, often by means of quit claim deeds, regardless of the validity of the claims. In the early 1960's, BLM once again contested the claims resulting in several lawsuits. In 1980, the Supreme Court held that oil shale is a valuable mineral that is patentable. In 1982 briefs were filed identifying 202 of the 525 claims void since they did not meet the claim and patent criteria.

In 1985, in a case involving TOSCO, Judge Finesilver, of the 10th District Court, upheld the validity of the claims based on the inconsistency of previous federal government actions in handling the issue over the past 65 years. In that decision, all rights and privileges of the public land were transferred to the claimants including: hunting, grazing, rights-of-way, sand, gravel, oil shale, oil, gas, coal royalty revenues and surface rights.

The United States decided to work out a compromise with the claimants rather than litigate the issues any further. The compromise transfers oil shale, and sand and gravel rights to the claimants. It retains for the federal government grazing and hunting use, rights-of-way, oil/gas/coal ownership and royalty revenues -- with certain caveats and provisions. The settlement restricts claimants' non-oil shale activities on the surface for 20 years, but it does provide them with the surface access necessary to produce the shale oil. At the end of that period, the surface rights will be turned over to the claimants for any use -- residential, commercial or industrial.

The U.S. mineral interests and surface interests are subservient to the right for oil shale development. The U.S. interests will be dominant for the non-oil shale surface uses for 20 years. The United States will file pleadings in water court relinquishing or withdrawing their water rights claims on the affected lands.

About 80 percent of the nation's recoverable reserves of oil shale are in the Piceance Basin. The lands affected by this settlement contain some of the nation's richest deposits. Both the TOSCO and Ertl claims, each of which are many times the size of Federal Tracts C-a or C-b, contain high-grade shale in excess of 25 gallons per ton. The Ertl property has shale deposits very near the surface. Minimal overburden could make the shale mineable through surface mining methods, which would greatly enhance the economics of future shale production. The TOSCO property controls the access to the Naval Oil Shale Reserve.

On September 19, 1986, the State of Colorado filed a motion to intervene in this settlement in United States District Court and the United States Court of Appeals. Colorado seeks to enjoin any conveyances contemplated by this agreement until Colorado's position can be heard. The purpose of this intervention is twofold: 1) to recognize the processes that have been established in federal law in land transfers of this magnitude; and 2) to recognize the interests of the State of Colorado and the due process to which other members of the public who may be affected by this decision are entitled. It is the interpretation of the Colorado State Attorney General that this action is subject to several provisions of the Federal Land Policy Management Act of 1976 and the National Environmental Policy Act.

On October 13, 1986, the 10th Circuit Court of Appeals denied the motion to intervene on the grounds of mootness, and the stay was dissolved.

On December 8, 1986, on behalf of various Colorado officials and public agencies, including Governor Richard Lamm, a complaint and motion for preliminary injunction were filed in Washington, D.C., challenging the validity the agreement between the United States and oil shale claimants. Basically, the suit alleges that the agreement is null and void due to non-compliance with the provisions of the Federal Land Policy Management Act (FLPMA) and the National Environmental Policy Act (NEPA). It is significant to note that the suit does not challenge the alleged merits of the Oil Shale Agreement which was intended to settle pending cases in the Colorado Federal District Court and the 10th Circuit. In other words, this suit is a procedural rather than a substantive challenge.

On January 7, 1987, the U.S. filed a motion to transfer the case back to Colorado.

Since February 1987, the State of Colorado has been working with the claimants to establish surface management agreements which will be covenants that will go with the land. The agreements cover hunting, fishing, grazing, spraying, transportation and utility corridors, wildlife habitat and natural areas. Representatives of Erti/Shell and Unocal have been involved to date. Expressions of interest have been received informally from TOSCO, Union and representatives of the individual owners.

Colorado Concerns

Neither the State of Colorado nor local governments were a party to the agreement. The State is directly impacted by the agreement based on its activities in the area including wildlife management, in-lieu land selections and development of recreational opportunities. Local governments are affected by present and future revenue sources and land use decisions. Conveyance of the lands to private ownership removes them from the public domain, dramatically changing the terms under which surface uses are managed by the public sector. Specific concerns include:

- Removal of land from the public trust. The acreage involved in the proposed settlement is essentially a privatization of resources previously held in the public trust. It is removing public land which could be available for alternate uses (recreation, grazing or preservation) from the sphere of public management. By removing this land from public management, the potential multiple uses of the land (recreation, grazing or preservation) may never be realized.
- Maximum return on the assets of the public trust. Some experts say the land in the area is valued between $700 and $1500 an acre. At $2.50 per acre, the federal government did not maximize its return on this asset. Further, many uses of those lands under the proposed agreement would not generate any revenues for state or local governments. If the claims are upheld, the dollar value of those claims should take into account the long-term, life cycle cost of the benefits of those lands to the public. In reality, oil shale's major use will be as a strategic fuel in times of crisis.

At that time, the value of oil will be inflated. Therefore, the value of those claims today should consider the future values of the resource rather than today's soft market. A patent claim fee of $2.50 is not representative of any of these ranges of value. Management of public assets includes maximizing the value of those lands to the public sector based on the range of possible uses for those lands.

- Representation of state interests. The settlement of the claims marks a change in course for the federal government, which for more than two decades has contested the mining claims in court. Through this litigation process, it has represented the interests of the State of Colorado by arguing that keeping the resources under federal control was in the public interest. When the federal government entered into private negotiations with the claimants without state or local government participation, it violated that trust. The secretive process raises several questions about the settlement:

  - o Does the 1872 mining law grant the Department of Interior the authority to enter into such an agreement?
  - o Are there federal procedures that must be followed in a land transfer of this magnitude?
  - o Has due process been met on the part of the grazees and other users of the land in shifting ownership which may affect their rights for access and use?
  - o Should gubernatorial approval be required for an action of this magnitude?
  - o Does a land transfer exceeding 2,500 acres require Congressional approval?
  - o Does an agreement of this nature require an environmental impact statement or a revision to existing statements or management plans that deal specifically with these 82,000 acres?

- Latitude in future uses and intentions. The language is vague in terms of the rights of the claimants in using the surface rights. If the federal government does not claim the surface rights for its use over the next 20 years, the claimants appear to have complete discretion over surface use (recreation, grazing and hunting) and full right to the revenues. How is "reasonable public access" defined?

- Impacts on farming, ranching and hunting. While the settlement provides for existing grazing and hunting uses, it gives considerable latitude to claimants. Lands could be posted after the patents are issued because of access and liability problems related to hunting. The settlement also places uncertainties on Western Slope ranching activities. Ranchers will be able to use this land for grazing under the financial terms, but not necessarily the other terms of the permits they currently have with the federal government. When those permits expire, they would be required to renegotiate agreements with the new owners.

- Federal land use pre-emption. In the resource management plans that have been completed for the area, local land use concerns are addressed. This same procedure should be incorporated in the transfer of public lands to private owners. Since land use decisions rest with local government in Colorado, they should be a participant at the negotiation table.

- Holding claims for land speculation. With regard to federal leases and other claims to federal lands, minimal requirements of due diligence on those claims should be met. There should be a good faith effort on the part of any company either to explore, assess and develop the resources or to relinquish them. The holding of public lands for speculative purposes is not in the public interest and is not fair to other companies who may wish to acquire the resource for development. The state has been firm in enforcing the due diligence requirements of federal coal leases. It has also limited the range of alternatives for due diligence (e.g., significant expenditures) as justification for holding a lease. Tying up federal lands unnecessarily may prevent viable alternative projects from moving forward due to the lack of accessible lands.

- Lack of ecomomic impact analysis. If the privatization of the land is upheld, the counties would receive property taxes and ad valorem taxes on the structures and improvements to the property. No economic analysis exists comparing the potential revenues from this agreement to the revenue stream that would be generated from the leasing of the land for mineral development. The state estimates that at current assessed values the difference between payments in lieu of taxes and property taxes would amount to only $500. In addition, the state would receive approximately $20,000 annually in its share of rental payments if the land were leased instead of patented. Incomes from bonus payments and royalties under a lease are unknown.

- Oversight of provisions of the settlement. Colorado is entitled to participate in the design and implementation of the settlement. In addition, Colorado recommends that the final transfer of surface rights 20 years from now be reviewed at that time before a transfer is made.

- Future implications. The settlement may have broad implications for other mining claims on the remaining 240,000 acres in the West that have yet to be settled. This includes over 99,000 acres in Colorado.

Economic Benefits of the Agreement

Federal lands are made available for mineral development through two principal channels: patents and leases.

When a significant mineral discovery is identified, an individual may claim the right to that mineral under the procedures outlined under the 1872 Mining Law. The claimant is granted the right to that mineral as well as the surface access necessary to mine that claim. The claimant is required to document a minimum of $100 per year in exploration, assessment or development work. After five years and $500 of investment, a patent may be granted. The patent transfers the ownership of that mineral right to the claimant. At that point, the claimants are responsible for local property taxes on the mineral rights and on any surface rights required to produce the mineral. They are also responsible for state severance taxes.

In leasing the minerals, the federal government retains both surface and mineral rights. The minerals are made available through a bid and bonus payment process. The bidder with the highest bonus payment wins the lease. The leaseholder is then required to pay rent on the land regardless of production. Royalty payments are required when production begins. Rents, bonus and royalty payments are divided 50/50 between the federal government and state and local governments. The state portion is then allocated to local governments based on a formula prescribed by the legislature. For example, in 1974, federal tracts C-a and C-b were leased for oil shale development. The bonus payment value to obtain the lease was $210 million for tract C-a and $117 million for tract C-b. The claimants pay 50¢/acre annually in rent for each of the 5,120 acre tracts. Fifty percent of these dollars are returned to the state.

When land is held by the federal government, a payment in lieu of taxes from the federal government to the county is made to compensate for the loss in property tax revenues. In 1984, Rio Blanco received an average of 10¢/acre on the federal lands including these oil shale properties. Garfield County received an average payment of 34¢/acre. These payments are based on a baseline of 75¢/acre adjusted for previous payments and revenues from timber and mineral activity. Rio Blanco County now gets about $4300 in federal payments and Garfield County receives about $12,000 on these lands.

The Garfield and Rio Blanco county assessors are currently appraising the land at $5 - $10 per acre for tax purposes. The oil shale is also valued in that range. Based on current tax levels, the Bureau of Land Management estimates that tax revenues would be about $4800 in Rio Blanco County. Garfield County anticipates that property tax revenues would be comparable to the current payments in lieu of taxes.

In terms of payments in lieu of taxes versus property taxes, the difference is insignificant today. No economic analysis has been done on the magnitude of ad valorem taxes when the property is improved and production occurs. However, privatization of the land precludes annual rent payments at 50¢ per acre and any bonus payments from leasing the land. The annual rent payment at 50¢/acre would yield a total of $41,000 each year--$20,500 of which would be returned to Colorado and the local jurisdictions. Privatization of the land also precludes any revenues from bonus payments from the bid process for leases. The state and local jurisdictions would receive 50 percent of those revenues as well. The state's share of the bonus payment from the 1974 leasing of tracts C-a and C-b was valued at over $160 million for a total of 10,240 acres. This approach applied to these lands could result in sizeable bonus payments and an annual rent payment in excess of projected property tax revenues today.

Reduced Recreational Opportunity

All 82,000 acres of the settlement occur within Planning Region 11. McKean and Nobe, 1981, reported $19,450,000 in direct annual expenditures by deer hunters within the region and $5,413,000 in direct annual expenditures by elk hunters within the region. There are four counties within State Planning Region 11 (Moffat, Rio Blanco, Garfield and Mesa). All impacts occur in two counties of this region -- Rio Blanco and Garfield counties. The deer and elk direct expenditure impacts are distributed to the county level based on recreation days for deer and elk hunters on the impacted areas in each county. In 1981, there were 147,166 deer recreation days and 169,066 elk recreation days within the region. Dividing the total deer economic impact by total deer recreation days yields the average economic impact per recreation day. The same methodology is applied to elk.

When this data is scaled down to the settlement portion of these two counties, the following financial impacts can be estimated:

County	Wildlife Species	Total Rec. Days	Projected Rec. Days Lost	Avg. Expenditure/ Rec. Day	Direct Expenditures Lost
Rio Blanco	Deer	34,167	12,657	$132.16	$1,672,749
	Elk	59,525	4,158	32.02	133,139
					$1,805,888
Garfield	Deer	35,427	4,898	$132.16	$ 647,320
	Elk	46,059	2,035	32.02	65,161
					$ 712,481

In the worst case, the total loss in Direct Expenditures would be $2,518,369 annually as well as loss in the various city and county taxes derived from related sales.

Real Estate Appraisals

The Division of Wildlife contracted an appraisal on two tracts of land in the settlement area totalling 1,400 surface acres within the Piceance Basin in December 1985. Surface non-irrigated acreage was valued at $400 per acre, and surface irrigated acreage was valued at $1500 per acre.

Wildlife Habitat and Migration Impacts

The major impact of the privatization of federal lands in the Piceance Basin is the loss of the ability of the Colorado Division of Wildlife to properly manage the deer and elk herds. Hunting is the most effective tool that the Division has to manage big game populations. Under current conditions, it is hard to obtain an adequate harvest when population is at high levels. If access is further restricted in the Basin, management may become impossible. The Colorado Division of Wildlife calculates that as many as 24,000 recreation days could be lost and approximately 50 percent of the harvest not be achieved as a result of this action. Additionally, the Division of Wildlife has classified summer range in this area as critical habitat for elk. There is a narrow band of aspen and spruce pockets bordering the basin on the South and West that is especially important as cover due to the Xeric climate of the region. Most of the lands proposed for patent are included in this classification. Migratory and habitat patterns for elk are summarized in Map 2 and for deer in Map 3.

The Ertl property includes several features of significance to the wildlife of the area. The subject property is a principle migration area for deer, and a critical habitat area for elk for calving and nursing. Critical areas include: Duck Creek, KU Gulch and Spruce Gulch. The area between Roan Plateau and the winter areas in Monument Gulch and Spring Creek is a migratory corridor for deer. All drainages with aspen and spruce trees are necessary for elk and deer. All springs and aboveground water are critical for wildlife species, including non-game mammals and birds. The ridge tops between Ryan Gulch and Duck Creek are critical sage grouse habitat. Sagebrush on these ridges should be disturbed as little as possible. No burning or spraying should be done without consultation with the Division of Wildlife. The spruce trees are very important as escape cover for elk and deer during hunting season. They are also critical to the blue grouse as winter habitat. Bear and mountain lion also frequent the area.

There are several wildlife issues on the Union and TOSCO patent lands on the south side of the Piceance Basin.

On the divide between the Piceance and Parachute drainages, the major issue is continued hunter access. Historically this BLM land is a very popular place for hunting deer, elk, lion, bear and grouse. The major access roads that should remain open in that area are: 1) Sprague Gulch access road which leads to the top of that divide from Piceance Creek; and 2) Cow Creek access road which leads to the top of that divide from Piceance Creek. Both roads run north/south from Piceance Creek to the divide. The Sprauge access road is approximately nine miles down Piceance Creek or west of Piceance Creek from Highway 13. Cow Creek is approximately three miles west of Highway 13 down Piceance Creek. In addition, the road that runs east and west of the divide between Piceance and Parachute drainages should remain open to provide circular access through the area.

With regard to habitat, the major species of concern would be sage grouse, blue grouse, deer, elk, black bear, and mountain lion. Although the area is not critical for the maintenance of a population, there would be noticeable impacts as development occurs. The sage grouse inhabit the ridge tops. Any degradation on a large scale on the ridge tops will impact sage grouse. The blue grouse inhabit both the ridge tops and the side hills. The quaker or aspen trees and heads of the drainages would be considered critical for the maintenance of those blue grouse.

The division has been conducting a deer study for approximately six years in conjunction with operations at the C-b Oil Shale Tract. The deer migrate down that divide or off the side hills to either Piceance Creek or Parachute Creek, with the Piceance Basin being the preferred location. Most of the deer seem to winter in Piceance Creek. The Division has not been able to designate specific routes of travel. The aspen trees associated with water and heads of drainages both on the Piceance Creek side but more specifically on the Parachute side are critical to those deer. A study conducted four or five years ago indicated that fawning areas were very closely associated with the aspen habitat. For the fawns, the understory in aspen is very good for concealment. Water is needed more frequently during fawning time.

Impacts on Rare Plants and Plant Communities

The oil shale claims settlement will affect habitats for several plant species which are candidates for listing as threatened or endangered by the U.S. Fish and Wildlife Service. In addition, the parcels contain several rare plant species which are on the Colorado Natural Areas Inventory's list of "plant species of special concern to Colorado." The Colorado Natural Areas Program has completed extensive floristic inventories in the Piceance Basin between 1982-1986. The vegetation of the Piceance Basin is one of the best known in the state. These features have been identified in the Piceance Basin Resource Management Plan. Privatization of this land does not guarantee the level of protection that exists under federal ownership.

The principal impact from the settlement to the vegetation of Piceance Basin is the development of South Cathedral Bluffs. South Cathedral Bluffs was identified by the Colorado Natural Areas Program, the Nature Conservancy and the Colorado Native Plant Society as the highest priority for protection and special management in the Piceance Basin due to rare plants, geologic features and scenic beauty. The identified oil shale settlement area includes South Cathedral Bluffs, and impacts from mining could be substantial on the bluffs.

A portion of the Weber Oil property bisects South Cathedral Bluffs, which has been designated a Colorado Natural Area and BLM Area of Critical Environmental Concern. The bluffs contain a significant assemblage of plants and communities endemic to the Green River Shale.

The portion of the mineral claim included in the natural area boundaries of South Cathedral Bluffs should be protected to preserve the integrity of this important endemic plant habitat by including it in the existing BLM and Colorado Natural Areas designations.

The following summary of vegetation values is keyed to Map 1.

Parcel	Rare Plants/Plant Communities
Ertl/Shell	North Cathedral Bluffs Piceance bladderpod 2 rare plant: Barneby's columbine 3 rare plant communities: Douglas fir - serviceberry - elk sedge Wyoming big sagebrush - snowberry - Pacific giant wildrye Douglas fir - mountain snowberry - elk sedge
Weber	The following plants and plant communities could be threatened on the South Cathedral Bluffs property. 4 rare plants: Dragon milkvetch Piceance bladderpod Barneby's Columbine Utah fescue 2 rare plant communities: Beardless bluebunch wheatgrass Great Basin grassland in good condition Douglas fir - mountain snowberry - elk sedge

COAL BED METHANE RESOURCE POTENTIAL

The agreement area has significant mineral and energy resource reserves. The current agreement preserves the federal ownership of these resources. This is significant since the 4,000 square miles of the Piceance Basin contain coal and gas resources in Cretaceous Mesaverde coal seams. There are approximately 250 billion tons of deeply buried (3,000 ft +) high volatile A to semi-anthracite coals containing up to 77 trillion standard cubic feet of gas. In the portion of the Piceance Basin containing the oil shale, the underlying coals average 90 feet net thickness and average 350 cubic feet of methane gas per ton. Coal bed methane is currently being developed in the San Juan Basin of Colorado and will be a significant resource along with "tight gas sand" when the supply of natural gas becomes short and the price rises to the $3-$4 level.

Chronology of Relevant Events

Pre 1920	Oil shale claims were filed.
1960's	Federal government determines that claims are invalid and refuses to issue patents.
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DEFINITIONS OF MAPPABLE BIOLOGICAL FEATURES

Mule Deer and Elk

Winter Range - That part of the home range of species where 90 percent of the individuals are located during a site-specific period of winter during the average five winters out of ten (this period is to be defined by CDOW personnel for each DAU).

Winter Concentration Areas - That part of the winter range of a species where densities are X% greater (defined for each DAU) than the surrounding winter range density during the same period used to define winter range in the average five winters out of ten.

Severe Winter Range - That part of the range of a species where 90 percent of the individuals are located when the annual snowpack is at its maximum in the two worst winters out of ten.

Production Areas - That part of the home range of a species occupied by the females during a specific period of spring. This period is May 15 to June 15 for elk (only known areas are mapped and this does not include all production areas for the DAU).

Highway Crossings - An area within the home range of a species defined by more than six highway mortalities per mile of highway or railroad per year.

Migration Pattern - A subjective indication of the general direction of the fall movements of migratory ungulate herds.

Migration Corridors - A specific mappable site through which large numbers of animals migrate and loss of which would change migration routes.

Critical Habitat - A designation which may be applied to any biological feature mapped for a species, thus indication that within a given DAU, loss of that biological feature would adversely affect that species. Mapping any biological feature does not arbitrarily classify that feature as "critical."

Resident Population Area - Areas with distinct populations of a species that fulfill all biological functions within the area identified. Individuals could be found in any part of the area at any time of the year.

Summer Range - That part of the home range of a species that is not considered Winter Range, including what has tradtionally been known as spring and fall transitional ranges.

nsh:1673

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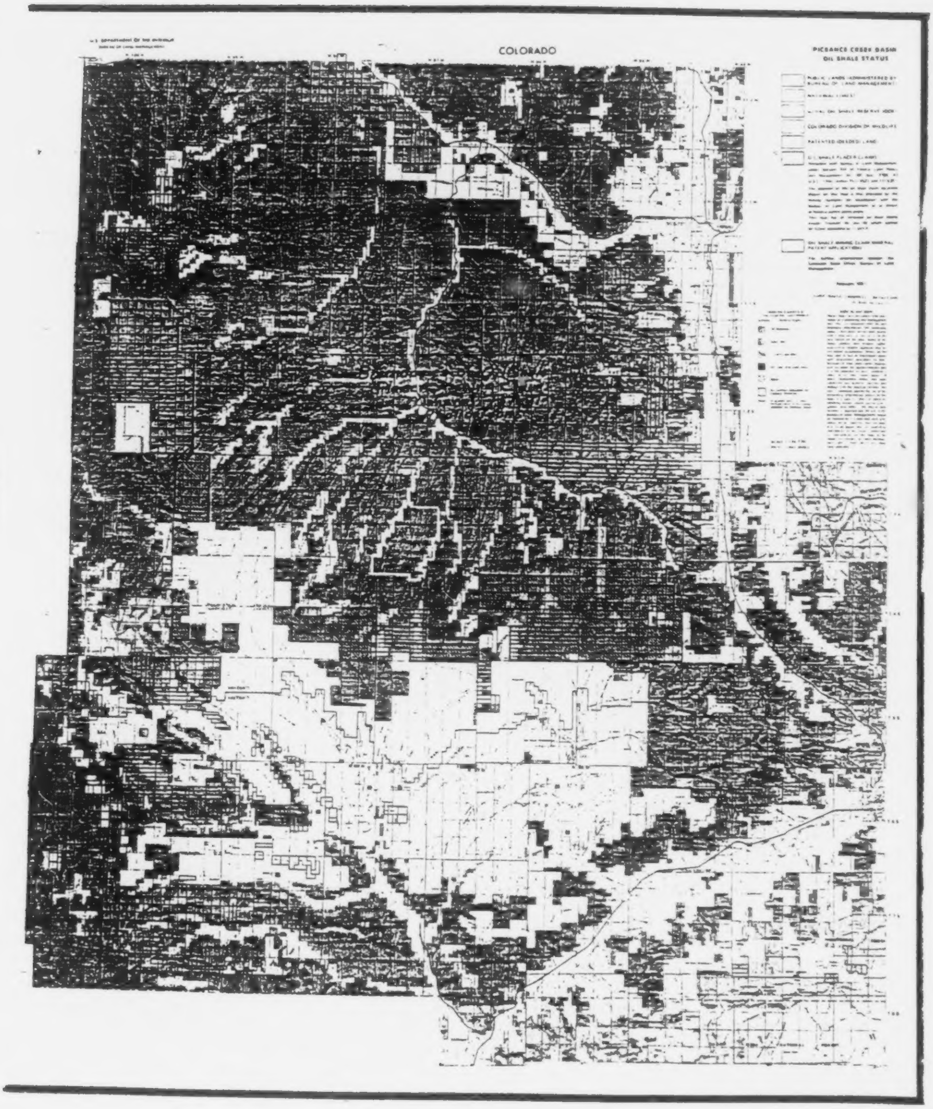
nsh:1670

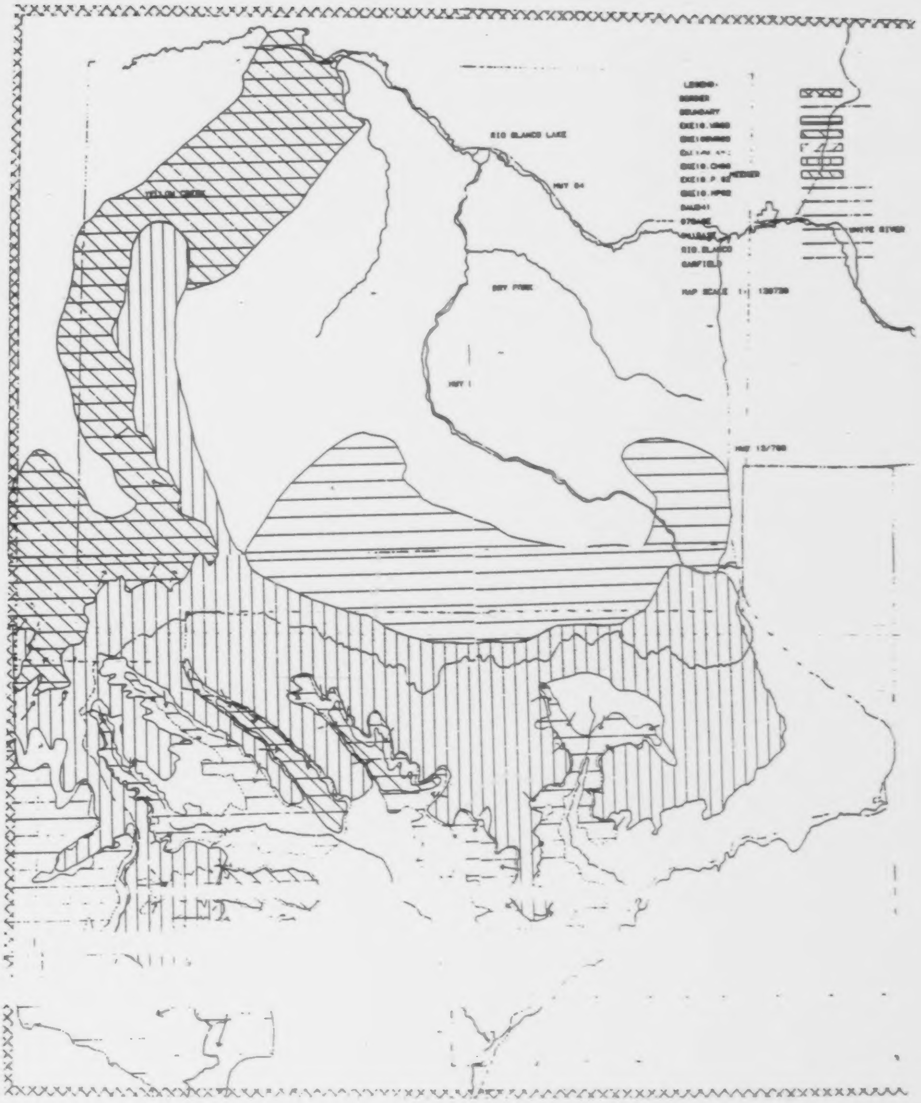
OIL SHALE CLAIMS

BLM SETTLEMENT


U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
COLORADO
PICEANCE CREEK BASIN
OIL SHALE STATUS
PUBLIC LANDS (ADMINISTERED BY BUREAU OF LAND MANAGEMENT)
NATIONAL FOREST
NAVAL OIL SHALE RESERVE (NOSR)
COLORADO DIVISION OF WILDLIFE
PATENTED (DEEDED) LAND
OIL SHALE PLACER CLAIMS
OIL SHALE MINING CLAIM MINERAL PATENT APPLICATIONS

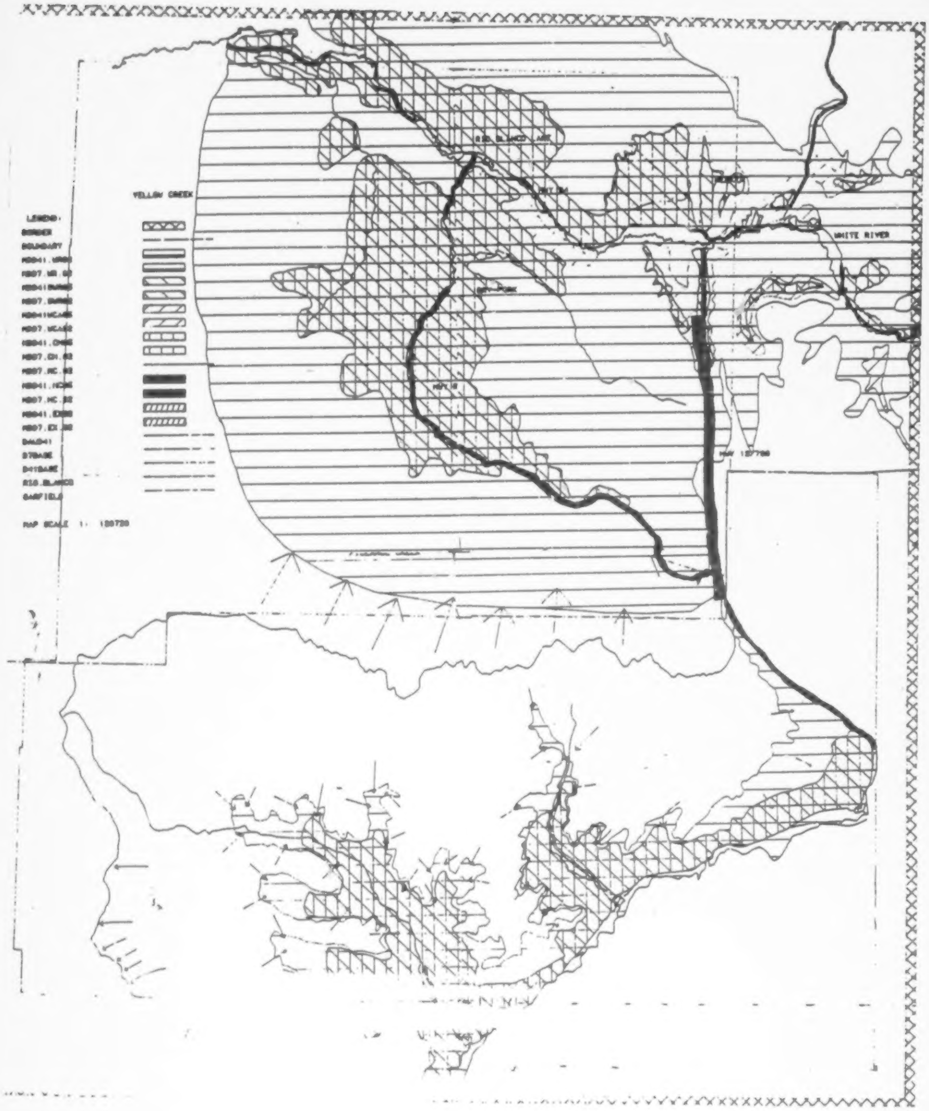
MAP 1

OIL SHALE CLAIMS
BLM SETTLEMENT
AUGUST 4, 1986


LEGEND:
BORDER
BOUNDARY
RIO BLANCO
GARFIELD
MAP SCALE 1: 126720
RIO BLANCO LAKE
HWY 64
WHITE RIVER
YELLOW CREEK
DRY FORK
HWY 13/789

MAP 2

ELK MIGRATION AND HABITAT AREAS
PICEANCE BASIN


YELLOW CREEK
LEGEND:
BORDER
BOUNDARY
GARFIELD
MAP SCALE 1: 126720
WHITE RIVER

MAP 3

DEER MIGRATION AND HABITAT AREAS
PICEANCE BASIN

Attachment IV

INFORMATION FROM THE U.S. BUREAU OF LAND MANAGEMENT

I. Placer Claim Patent Process

1. Claimant secures title to claim.
2. Claimant posts claim with a "notice of intention to apply for patent" for 60 days.
3. Claimant obtains an abstract of title to the claims.
4. Claimant applies for patent to Colorado State Office of BLM.

   Paperwork includes (in duplicate):
   a. Proof of ownership
   b. Basis for right to patent
      1) Valuable mineral deposit on each claim
      2) At least $500 in improvements for each claim
   c. Statement concerning U.S. citizenship
   d. Statement concerning involvement with the atomic energy program
   e. Statements by two disinterested persons that the claim is placer ground
   f. Statement by two disinterested persons that required improvements were made
   g. $25 filing fee

5. BLM checks title to claim (30 days).
6. BLM authorizes publication of the "notice of application" in an area newspaper.
7. Claimant publishes "notice of application" for 9 weeks (60 days).
8. Claimant mails proof of publication to BLM.
9. Claimant pays purchase price of $2.50 per acre.
10. BLM issues "Final Certificate of Mineral Entry" (30 days).
11. BLM assigns case to a mineral examiner.
12. Mineral examiner examines claims for discovery and improvements (up to one year for large claim groups).
13. Mineral examiner writes mineral report (up to four months).
14. Colorado State Office approves mineral report (30 days).
15. Claim is either clearlisted or contested.

    a. If clearlisted, BLM issues patent (30 days).
    b. If contested, BLM issues complaint, schedules hearing, etc. (interminable).

For a single placer claim with everything in order, patent could be issued in about one year. For larger claim groups, two years should be expected. If title difficulties, litigation, or politics intervene, the time will be indefinite.

II. Claim Exceptions to Proposed Legislation*

Mineral Entry #	Filing Date	Applicant	Claim Names	No. of Claims	Acreage
C-36293	8/24/82	Harlan & Dorothy Hugg	Bluebird etc.	13	2,080.00
C-38579	1/23/84	Exxon Corp.	Wash. 1-8 Atlantic 1-8 Princess Ann 1-4	20	3,280.80
C-39464	10/26/83	Union Oil of Calif.	French 17-24 Lands 2 & 3	10	1,216,14
C-41836	6/11/85	Tosco Corp.	Hydrocarbon 76-87	12	1,880.00
C-43354	4/4/86	Marathon Oil Co.	Portland 1-6	6	982.92
C-35080	2/19/82	Harlan & Dorothy Hugg	Pickup 1-7	7	1,120.00
				68	10,559.86

* Cutoff date of February 5, 1987.

III. Elements of 1986 Interior Agreement

1. Full title to claims and surface plus all other minerals present.
2. U.S. to keep oil, gas and coal.
3. Oil shale is the dominant right.
4. Existing oil and gas leases are maintained until expiration.
5. For future mineral leases, oil shale is the dominant estate.
6. Reasonable public access for hunting provided.
7. Existing grazing use to continue until leases expire.
8. Surface use for non-oil shale activities allowed after 20 years.
9. Water rights maintained by the federal government.

IV. Outstanding Oil Shale Claims

100th Congress *1st Session*	HOUSE OF REPRESENTATIVES	Report 100-43

OIL SHALE MINING CLAIMS

Claimant	Number of claims	County	Acres
COLORADO			
Geokinetics Inc	66	Rio Blanco	10,560.00
Cooley, Frank G	28	do	4,480.00
Kenney, Kenneth	17	do	2,720.00
Virginia-Colorado Devl	8	Garfield	1,280.00
Black, Buelah B., et al	12	Rio Blanco	1,920.00
Savage, John W., et al	143	Garfield and Rio Blanco	22,880.00
Davis, Lola, et al	20	Rio Blanco	3,200.00
Chevron Shale Oil Co	9	Garfield	1,440.00
Flynn, Doris (estate) et al	33	do	5,280.00
Hubbard, Kenneth	2	do	320.00
Gordon Mining	1	do	160.00
Jacobsen, Linda H., et al	58	do	9,280.00
Oil Shale Mining Co	6	do	960.00
Equity Oil Co	3	Rio Blanco	480.00
Hi Tech Synfuels	8	Garfield	1,280.00
Phyllis, Daniels A	2	do	320.00
Stafford, Genelle, et al	15	do	2,400.00
Aguila Energy	56	do	8,960.00
English, R.I. (estate)	1	do	160.00
Farnum, J.R., et al	14	do	2,240.00
McLain, Alice M	25	Rio Blanco	4,000.00
Houseman, Ivy B., et al	11	do	1,760.00
Rickstrew, Betty L	6	Garfield	960.00
Queen, Samuel D., et al	8	Rio Blanco	1,280.00
Subtotal	552		88,320.00
Patent applications not in the Tosco settlement agreement			
Frankl Winegar	2	Rio Blanco	320.00
TOSCO Corp	12	Garfield	1,880.00
Marathon Oil Co., et al	5	Rio Blanco	982.90
Union Oil of California	10	Garfield	1,216.14
Exxon Corp	20	do	3,203.80
Union Oil of California	4	do	686.84
Harlan and Dorothy Hugg	7	do	1,120.00
Do	13	do	2,000.00
Subtotal	74		11,469.70
Total	626		99,729.70
UTAH			
Sonic Shale Oil Co	19	Uintah	3,040.00
Chevron U.S.A.	230	do	35,869.05
Joyce C. McCleery	17	do	2,720.00
Production Industries Corp	277	Duchesne	44,239.65
Do	30	Utah	4,800.00
Do	53	Uintah	8,480.00
Alexander H. Walker	25	Duchesne	4,523.07
A.H. Walker & Co	11	do	1,760.00
Exxon Corp	14	Utah	2,240.00
Hugh Gagon	10	Uintah	1,600.00
Arapaho Petroleum, Inc	21	do	3,360.00
Do	11	Grand	1,680.00
Henry Harris	10	Uintah	1,600.00
Total	732		115,931.77
WYOMING			
Production Industries	336	Lincoln	53,760
Chevron Oil	4	do	640
Total	340		54,400

Note.—Acreage based on associated placer claims of 160 acres each

OIL SHALE LANDS

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September 2, 1987	Defendants reply to Colorado's reply brief.
October 16, 1987	State testifies before Senate Subcommittee on Mineral Resource Development and Production.
January 1988	Senator Wirth introduces bill.
February 1988	Department of Interior circulates draft bill.
March 8, 1988	Judge Finesilver dismisses case without prejudice.
July 1988 - Feb. 1989	Oil Shale Lands Committee discusses compromise legislation.
January - December 1988	Surface management agreements reached with Shell, Ertl, Tosco and Union
1989	Surface management agreements pending with Exxon/Weber Oil
February 28, 1989	State testifies before House Subcommittee on Mining and Natural Resources on H.R. 643. Proposes that all complete applications be subject to the patent process subject to four provisions: 1) surface management agreement required for claims exempted from the bill; 2) surface right retained by the federal government; 3) Congress and Interior review validity criteria; and 4) Congress reevaluate the annual assessment and patent fees.
July 31, 1989	State testifies before Senate Subcommittee on Mineral Resource Development and Production. Proposes alternatives to fees set in H.R. 643 and requests deletion of provision to prohibit leases for oil shale claimholders in S. 30.

7430A

Associated Governments of Northwest Colorado

STATEMENT OF PEGGY RECTOR, CHAIRMAN, ASSOCIATED GOVERNMENTS OF NORTHWEST COLORADO, ON PENDING LEGISLATION TO AMEND THE PATENTING PROCESS FOR OIL SHALE LANDS CLAIMS

This Association, representing local governments in Northwest Colorado, appreciates Congressional efforts to obtain a House/Senate compromise on the Oil Shale Lands Claim issue.

Our Board of Directors has reviewed the House passed bill that would allow some additional claims to be considered. We consider it a step in the right direction compared to the impasse reached in the last Congress.

However, we also believe the $2,000 per acre patent fee is too high. This would result in as much as a $34 million cost to some citizen claim holders who have maintained their claims under the 1872 Mining Law. It would be confiscatory at that rate.

On the other hand we do not blame anyone for considering the existing $2.50 per acre patent fee as too low. Congress has not adjusted this processing fee since the 1872 Mining Law was enacted.

Therefore, this Association is proposing the establishment of a patent fee that would recover the full cost of processing patent applications. This would be an equitable processing fee. It could either be set based upon an average cost or based upon billing of actual costs encurred by the Department of Interior for each application.

This Association also believes that all applications filed by the date of enactment of the new legislation should be considered for patent. Cutting off eligible applications upon "introduction" of a bill results in a retroactive change in federal law. Besides raising Constitutional issues, this is just not fair. Claim holders who have maintained their claims should have a "window of opportunity" to file applications under any new rules.

BOX 351 RIFLE, COLORADO 81650 TELEPHONE 303-625-1723

If these two important changes can be incorporated as amendments to a final bill, a reasonable compromise will have been achieved. The existing provisions in the House passed bill calling for the federal government to retain surface rights plus retention of oil, gas and coal mineral rights would help assure that the patent process would result in future oil shale production, not land speculation.

This statement is made representing my views as Chairman of the Associated Governments of Northwest Colorado. In addition during the past year I have served as Chairman of an ad-hoc Oil Shale Lands Claims Committee.

The Oil Shale Lands Claims Committee was formed of volunteers interested in attempts to develop a compromise legislative proposal.

After an organizational period, the Committee has met four times since last August. A variety of legislative proposals have been circulated for review between meetings. It has been a hard working group. Committee membership represents the following:

- City of Rifle
- Rio Blanco County
- Associated Governments of Northwest Colorado
- Utah State Energy Office
- Colorado Department of Natural Resources
- Colorado Wildlife Federation
- Sierra Club
- Small claimants, Utah and Colorado
- Large claimants, Utah and Colorado
- Grazing/Agriculture Lessees
- Property Taxpayers

The Committee meetings have been informal in nature with other interested or affected parties welcomed to participate. Other participants have included representatives from the National Wildlife Federation, the Western Organization of Resource Councils, the Tel Ertle Foundation, and Club 20, a western Colorado organization of communities and industry.

Representatives of the Bureau of Land Management have attended all meetings to serve as technical resource advisors and to answer questions concerning the claims patent process.

Without repeating all of the proposals from our Committee deliberations it appears that significant consensus exists for development of compromise on the following issues:

- Surface rights. The claimants appear willing to relinquish surface rights usually associated with patent title, other than the right to develop the oil shale resource. This would be accomplished either through legislative provision or a surface right agreement.

- Oil Shale and Associated Minerals. All proposals indicate patent or lease rights should be limited to oil shale and associated minerals to achieve a compromise.

- Other Minerals. As part of any compromise all proposals indicate other minerals, such as coal, oil and natural gas should remain with the United States Government.

- NEPA requirements. All parties agree that NEPA and other environmental laws should apply to any oil shale development.

- Reclamation Bond requirements. All parties basically agree that adequate State and Federal reclamation bonds are necessary. Claimants desire that the State and Federal requirements should be coordinated to avoid double bonding.

The areas of substantial disagreement include the following:

- Window-of-opportunity for additional patents. Whether or not claim holders with unpatented claims should have the opportunity to apply for patents remains one of the key areas of contention.

- Validity Tests. Views on validity tests are interrelated with whether claimants should be allowed to apply for patents. All parties agree that validity tests should be conducted rigorously. However, claimants would resist any new standards other than those now required by the 1892 mining law.

- Leasing Option. All parties would either require or agree to a leasing option. Claimants would agree to such an option only if a patent application (window-of-opportunity) also exists. However the required 12.5% royalty rate is not agreed to since variable royalty rates now exist for mining of other minerals under the Mineral Leasing Act of 1920.

- Requirements to maintain unpatented claims. Disagreement exists on any new requirements for maintaining or perfecting an unpatented claim if there is no alternative (window-of-opportunity) for claim applications. Claimants are willing to have unpatented claims ruled invalid (or subject to new requirements) after a one-year period is established to submit claim applications.

In summary, I urge approval of the two amendments to the House passed bill suggested by the Associated Governments of Northwest Colorado.

SUMMARY OF PROPOSALS UNDER CONSIDERATION OF THE AD HOC OIL SHALE LAND CLAIMS COMMITTEE

FEBRUARY 24, 1989

AREA	STATE PROPOSAL	LOCAL PROPOSAL	CLAIMANT PROPOSAL	ENVIRONMENTAL
Window-of-opportunity for patent applications.	No window-of-opportunity for applications not filed before 1/24/89. Would allow processing of all applications filed prior to 1/24/89, whether completed or not.	Allow applications for "definitive" period of time only. Afterward claims would be considered invalid or abandoned.	One-year period to file intent. 2 years to complete application.	New legislation to apply to all outstanding claims. All acts necessary to obtain a patent (procedural as well as substantive) must have been completed by 1/24/89. No window-of-opportunity.
Requirements to maintain unpatented claims.	Support revision and update of financial requirements of 1872 Mining Law.	Not applicable after "definitive" period of window-of-opportunity.	As required by 1872 Mining Law.	Four conditions must be met: a. $2,000 yearly assessment or payment-in-lieu, b. missing 1 year invalidates claim, c. no rights to surface or other subsurface minerals, d. at end of production surface & remaining minerals revert.
Validity tests for claim applications.	DOI should establish criteria with public comment period. Should review process fee. Allow 2 year period for validity tests.	Rigorous test as established by D.O.I.	Rigorous per DOI criteria, no new standards unique to oil shale claims.	Rigorous, including assessment work, abandonment, fraudulent location, adverse possession, requirement of discovery prior to 1920, a discovery standard that more accurately accounts for the realistic prospect of mining, and validity of old contests.
Surface Rights	Completed applications would be subject to surface rights agreement with state. Other applications would relinquish surface rights, except oil shale access.	Limit patent to Oil Shale and associated minerals only.	Surface management agreements for applications filed before 1/24/89. For applicants after 1/24/89, relinquish surface ownership, have right-of access for development.	Relinquished subject to mining.
Rights to oil shale & associated minerals.	Retain oil shale and associated minerals only.	Retain oil shale and associated minerals.	Retain oil shale and associated minerals only.	Retain oil shale & associated minerals only.
Leasing Option	Support leasing option; with competitive and hardship royalty rates.	Offer as an option; along with a patent option (window-of-opportunity).	OK as an option, as long as there is a patent option (window-of-opportunity)	Leasing option with 20 year diligence requirement on that tract, so combining lease tracts into larger units for meeting diligence.
NEPA applicability	NEPA should apply	NEPA and all state and local land use & environmental laws should apply.	NEPA should apply.	NEPA requirements followed.
Reclamation Bond.	Support reclamation requirements.	Adequate Reclamation Bonds to insure surface restoration.	Bonds should be required. Coordinate state/fed bonds.	Guarantee that adequate reclamation bond is posted.
Rights to other minerals	Relinquish	Relinquish	Relinquish, OK	Relinquish other minerals.
Previous DOI Process	Need to insure DOI consultation with state	-	Investigation OK, with appropriation.	Investigation by Congress of DOI processing of previous oil shale claims.

Placer Claim Patent Process

1. Claimant secures title to claim
2. Claimant posts claim with a "notice of intention to apply for patent" for 60 days
3. Claimant obtains an abstract of title to the claims
4. Claimant applies for patent to Colorado State Office of BLM. Paperwork includes, in duplicate,:
    a. Proof of ownership
    b. Basis for right to patent
        1) Valuable mineral deposit on each claim
        2) At least $500 in improvements for each claim
    c. Statement concerning U.S. citizenship
    d. Statement concerning involvement with the atomic energy program
    e. Statements by two disinterested persons that the claim is placer ground
    f. Statement by two disinterested persons that required improvements were made
    g. $25 filing fee
5. BLM checks title to claim (30 days)
6. BLM authorizes publication of the "notice of application" in an area newspaper
7. Claiment publishes "notice of application" for 9 weeks (60 days)
8. Claimant mails proof of publication to BLM
9. Claimant pays purchase price of $2.50 per acre
10. BLM issues "Final Certificate of Mineral Entry" (30 days)
11. BLM assigns case to a mineral examiner
12. Mineral examiner examines claims for discovery and improvements (up to one year for large claim groups)
13. Mineral examiner writes mineral report (up to four months)
14. Colorado State Office approves mineral report (30 days)
15. Claim is either clearlisted or contested

    If clearlisted, BLM issues patent (30 days)
    If contested, BLM issues complaint, schedules hearing, etc. (interminable)

For a single placer claim with everything in order, patent could be issued in about one year. For larger claim groups, two years should be expected. If title difficulties, litigation, or politics intervene, the time will be indefinite.

Associated Governments of Northwest Colorado

Also to
Sen. Armstrong
Sen. Wirth

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June 6, 1989

Representative Ben Nighthorse Campbell
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Campbell:

This Association, representing local governments in Northwest Colorado, appreciates your efforts to obtain a House/Senate compromise on the Oil Shale Lands Claim issue.

Our Board of Directors has reviewed the House passed bill that would allow some additional claims to be considered. We consider it a step in the right direction compared to the impasse reached in the last Congress.

However, we also believe the $2,000 per acre patent fee is too high. This would result in as much as a $34 million cost to some citizen claim holders who have maintained their claims under the 1872 Mining Law. It would be confiscatory at that rate.

On the other hand we do not blame anyone for considering the existing $2.50 per acre patent fee as too low, Congress has not adjusted this processing fee since the 1872 Mining Law was enacted.

Therefore, this Association is proposing the establishment of a patent fee that would recover the full cost of processing patent applications. This would be an equitable processing fee. It could either be set based upon an average cost or based upon billing of actual costs encurred by the Dept. of Interior for each application.

This Association also believes that all applications filed by the date of enactment of the new legislation should be considered for patent. Cutting off eligible applications upon "introduction" of a bill results in a retroactive change in federal law. Besides raising Constitutional issues, this is just not fair. Claim holders who have maintained their claims should have a "window of opportunity" to file applications under any new rules.

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If these two changes can be incorporated as amendments to a final bill, this Association believes a reasonable compromise will have been achieved. The existing provisions in the bill calling for the federal government to retain surface rights plus retention of oil, gas and coal mineral rights would help assure that the patent process would result in oil shale production, not land speculation.

Sincerely,

Peg Rector, Chairman

Jim Evans, Director

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DEPARTMENT OF
NATURAL RESOURCES

Kon

CLUB 20
A Western Colorado coalition of counties, communities, industries & individuals
303/242-3264
845 Grand ★ P.O. Box 550
Grand Junction, Colorado 81502-0550

RESOLUTION: GRAND JUNCTION

BE IT KNOWN BY THESE PRESENTS THAT:

WHEREAS, oil shale mining claims were located in the Piceance Basin in Colorado under the 1872 General Mining Laws before enactment of the 1920 Mineral Leasing Act, which provided for the leasing of oil shale thereafter, and

WHEREAS, the owners of many of those oil shale claims that have not been patented have equitable and legal rights that have vested over the years, and

WHEREAS, H.R. 643 and S. 30 were introduced in the United State House of Representatives and Senate on January 24, and 25, 1989 respectively, and were sponsored by some members of the Colorado delegation to the 101st Congress, and

WHEREAS, H.R. 643 and S. 30 address important issues affecting owners of unpatented oil shale mining claims and the economic interests of citizens and residents of counties in Colorado impacted by potential oil shale development, and

WHEREAS, an Ad Hoc Oil Shale Lands Claim Committee has been established to develop a fair and equitable proposal to allow patenting of valid oil shale claims, now

THEREFORE, BE IT RESOLVED BY THE BOARD OF CLUB 20, a western Colorado coalition of counties, communities, industries and individuals, THAT H.R. 643 and S. 30 should be amended to recognize interests in and rights of owners in unpatented oil shale mining claims as follows:

a. A definite period of time be provided for an owner of an oil shale mining claim to apply for a mineral patent if the owner has not already done so;

b. The mineral patent shall convey the oil shale and associated minerals only; rights to oil, gas, coal and other minerals shall remain with the U.S. governments;

c. The oil shale patentee shall have the right to use so much of the surface as is necessary for oil shale mining operations; other surface rights shall remain with the U.S. government;

d. The oil shale mining operator shall comply with all applicable local, state and federal laws and regulations relating to mining, surfaces and environmental uses, reclamation, rehabitation, and restoration of mined land;

e. All valid oil shale patent applications filed pursuant to these amendments to H.R. 643 and S. 30 shall be processed promptly by the Department of Interior, and final action shall occur no later than two years after the application is filed.

f. An oil shale patent applications for which final certificates or partial final certificates of entry have already been issued shall be exempted from these amendments and from H.R. 630 and S. 30, and

BE IT FURTHER RESOLVED THAT the Ad Hoc Oil Shale Lands Claim Committee and all members of the Colorado delegation to the 101st Congress of the United States and all members of Congress who are sponsors of either H.R. 643 or S. 30, be promptly notified of this resolution and its terms and provision, and be advised of the absolute necessity for the amendment of H.R. 643 and S. 30 to achieve the objectives of this resolution.

THIS RESOLUTION, after discussion, was adopted unanimously by the Board of Directors of Club 20 at their meeting held at the Holiday Inn, Grand Junction, Colorado, on February 10, 1989.

Joseph C. Prinster

Club 20 Chairman of the Board

William K. Cleary

Club 20 President

February 10, 1989

Senator WIRTH. Mr. Cattany, thank you again. You have not only presented a very lucid picture of what you think ought to be done, but once again, you have reflected your capability of being somebody who can talk to all of the parties in all of this.

In the discussion with all the parties, are you still having discussions with the working group? That is not going on anymore?

Mr. CATTANY. That's not. The efforts of that working group concluded prior to the February 28 hearing in the House.

Senator WIRTH. When you testified before this committee in 1987, you indicated that you were having some significant difficulty getting the Department of the Interior to sit down with you to discuss the management of the settlement agreement lands. Is that still the case?

Mr. CATTANY. Actually we have had fairly good working relationships with the Bureau of Land Management in Colorado. In reference to the question that Senator Bingaman asked Mr. Hughes earlier, the word has come out of Colorado that the policy decisions are made in Washington, so therefore the role of the BLM in Colorado has been much more of a resource to the discussions that went on the latter part of last year in identifying the criteria that would be used for the patenting of the claims, identifying the claims that were pending and what their interpretation of the validity criteria would be. But they have participated and have attended all the meetings.

We have an informal agreement from the State BLM office that they will consult with us prior to the issuance of any future patents, but we would still like to see that consultation formally acknowledged out of Washington.

Senator WIRTH. So, things have gotten a lot better with Interior than they were 2 years ago. How would you describe the cooperation of the Interior Department two years ago in these discussions?

Mr. CATTANY. Well, 2 years ago, as I stated in my earlier testimony, we read about the settlement of the 1986 oil-shale claims in the Rocky Mountain News and received a copy of that settlement from the Rocky Mountain News. We did not have a copy of that agreement from the Department of the Interior prior to that time. And we had gone to them at that point, asked them to keep us posted as to any future actions on the part of the Department and, quite frankly, the information that we got on the pending actions came from your office as you were a Representative. We would normally get a call on Friday as to what you heard was going to be happening on Monday of the following week. So, there really was not any consultation at that time.

As we filed our litigation then in late 1986 and early 1987, we kept the Department of the Interior apprised of what was going on, but it was not until February 1988 that the Assistant Secretary of the Department of the Interior sat down with us and laid out Interior's ideas as to the resolution of the issue, which at that point was in the form of a draft bill.

Senator WIRTH. Earlier I read to Mr. Hughes the statement that had been made by his predecessor, that the primary objective he felt in his job was to ensure the rights of the claimants, you know, no reference in that to the public or the public lands and so on.

Do you feel that the Department of the Interior has an obligation to the public and the public lands and not just to the claimants?

Mr. **Cattany**. I do indeed, and I think that we have, as well as the department of natural resources or the State of Colorado, that same obligation. That is why the "if" issue has been rather difficult I think to resolve over the last year, that there are certain vested rights, that if they have been followed according to law, should be granted. However, there are a number of other issues which relate to land management that where all the documentation is not in or the law has not been followed, clearly all the parties that are represented need to—that are affected by the decision need to have a say in the resolution.

And I think that is why our comments on the House bill and the Senate bill are sort of—you know, there are some for certain ideas and against others, but it is our attempt to try to balance out both the public policy aspect of the disposition of these and the management of these natural resources and any vested rights that may exist where they are clear and documentable.

Senator **Wirth**. Two years I described what had happened as sort of Teapot Dome South. I just cannot understand how public officials can cozy up to a situation in which the public lands, no matter how many legalistic arguments you can envelope the decision in, can allow public lands to go for $2.50 an acre and then be turned around right away and sold for $2,000 an acre, just boom, turning right around. It seems to me that any modicum of public interest is absolutely destroyed in that. I think that that is an insult to the public and an outrage. I think that is bad enough by itself.

But I think also—this is history, but it is history that we are all now revisiting as the HUD scandal comes up and the S&L scandal comes up and the delinquency of the previous administration watching over what happened becomes clearer and clearer and clearer.

Not only is that a problem that I think the American public is and should be deeply concerned about, but I think it does an enormous disservice to the oil-shale industry. As many of us have thought, if there is potential in the oil-shale industry, that ought to be examined. It ought to be closely looked at. It has up sides and down sides.

We're aware of that, but here is this enormous resource, and here are a handful of public officials giving the whole industry a huge black eye, which I think is also a disservice to that industry, this kind of selfish myopia that seemed to pervade what was going on down there without any sense at all again of the public interest which is not only the public lands but presumably the public's understanding of the potential of energy independence, the possibility of this as a resource in the future that we might figure out how to exploit without the sort of damage that currently appears.

It is just beyond me. I have never seen anything like it.

Maybe you could tell us just on that front, leaving aside—you are not in the Federal agency. I am sure that there are many people in the government of the State of Colorado who share my own sense of outrage on this. Maybe you could tell us what are you and the Governor are doing to promote the development of oil shale as a resource. While all of this outrage is going on, you all are trying to be responsible stewards. And what are you all doing?

Mr. CATTANY. I think that that is probably where, at least from time to time, the role of the State has been misrepresented because going back to the early 1980's, the position of Colorado related to oil-shale development was to look at a modular, phased development of that industry. There were a lot of unknowns 10 years ago in terms of the environmental impacts of the development of oil shale, the socioeconomic impacts of oil shale, and what technology is most appropriate to develop that, whether it should be done underground, whether it should be done on the surface. And as a result, we have always looked at, as proposals came forward in the early 1980s, to stress that we wanted to see a modular development of those projects, not to look at a 100,000-barrel a day facility overnight or one-half-of-a-million-barrel a day facility as was originally proposed, but to break those up into pieces to work the technology bugs out, the impact bugs out, and then move to the next phase of that development.

And I think that that philosophy is continuing today. We have been supportive of the work that Union oil has been doing at Parachute Creek, have worked with them to lower some of their operating costs to continue the work that they are doing to find out whether or not surface retorting of oil-shale works and whether or not the Union oil-shale technology works.

Similarly, we have been working with Occidental Oil and Lawrence Livermore Lab to look at the possibility of both a demonstration project on modified in situ oil-shale technology on the CB oil-shale side and the possibility of bringing the Lawrence Livermore Lab surface retort technology to that side as well so that we can look at a package of technologies to look what will work and work in an appropriate time frame should oil shale ever be a strategic resource that this country needs.

But again, our efforts have been on the demonstration phase and trying to see where the State and Federal Government and industry can do a partnership to develop the technology so that once the technology is proven, the private sector can take over to develop that resource.

Senator WIRTH. Do you think a legislative settlement of the issue in front of us would help eventual oil shale development and, if so, why?

Mr. CATTANY. I think it would for a couple of reasons. First of all, as you mentioned earlier, this continuing controversy gives the resource a black eye, and that if, in fact, there is a future for oil shale, we need to move on to find out whether or not it can be economic and whether it can be produced and be produced in an economically acceptable way. So, that is the first part of the answer to your question.

The other part of it is that I think that continuing litigation on this issue does not answer the fundamental questions, and I think that the challenge before this committee or a conference committee is to settle certain things like the $2.50-an-acre-patent fee. Is that a fee for a government service? Is that to reflect the value of the land or the mineral resource that is being privatized? And those kinds of questions need to be answered I think legislatively or the debate will continue whether or not a bill is passed in Congress or not because there will probably be continuing litigation. So, I think that the value of legislation at this point is to settle once and for all not only how these rights are transferred, under what validity criteria, but at what cost and what the purpose of that cost is, and finally what unpatented claims would be applicable under a settlement. So, it is very important.

Senator WIRTH. I think that is very constructive, and again, I appreciate it.

Let me ask you a final question if I might. You went through a long summary of your testimony. If you were looking at the highlights of what a summary legislative agreement would include, what would be in that settlement?

Mr. CATTANY. If I were writing the testimony, they would probably have about five or six elements. The first would be surface management agreements with the State of Colorado for claims that are exempted under the bill.

The second is the exclusion of surface rights for the other applicable claims and also exclusion of the nonassociated minerals, the coal and the oil and the gas.

The third is the effective cutoff date for the filing of application fees, whether that be the date of enactment of the bill, January 24 or January 25 as the current bills stand right now, or a year in the future, but what that final date is.

And the fourth element is the validity criterion. I think that is probably what is most important, that when the claims were patented in 1986, there was previous litigation that said that 202 of those 525 claims were invalid. I think we need to go back and find out if that was the case, not to undo what was done in 1986, but if there was oversight in the review process by BLM or if it was incomplete that we make sure that that doesn't happen whether it is 25,000 acres or 50,000 acres that may be patented in the future. I think we need to go back and look at that.

So, those are probably the four key pieces that I would mention.

Senator WIRTH. I appreciate it.

Two final questions. One, the fee issue. Would you suggest that any kind of a royalty be put into the fee equation in legislation?

Mr. CATTANY. In the leasing option, certainly. I am not quite convinced at this point that 12.5 percent is the appropriate royalty rate, but I think that certainly, as with other leasable minerals, there is a royalty rate that is there from 5 percent for underground coal to 12.5 percent for oil and gas. So, I think that a royalty rate is appropriate.

I think that in setting that rate, we also need to make sure that there is some sort of a hardship provision so that the royalty rate, as I said, in combination of the other costs of production do not make the resource uneconomic to produce because then you put us back where we are now. We do not know whether oil shale can be produced at a——

Senator WIRTH. Finally, what was your 200 out of 500 claims figure just a little bit earlier?

Mr. CATTANY. At the time that we were going through our litigation, it was pointed out to us—and I cannot give you the legal citation because I am not a lawyer, but I could get that for you. We were told by some of the very strong opponents of the 1986 agreement that there was previous litigation that had shown that 202 of those 525 claims were not valid, that either they were dummy locators or there was not evidence of a valuable resource or the property was not——

Senator WIRTH. What happened to those 500 claims?

Mr. CATTANY. They were still patented though. So, I think that there is——

Senator WIRTH. And what is the status of those 500 patented claims now?

Mr. CATTANY. Well, both the surface and the mineral rights have been privatized. We have entered into surface——

Senator WIRTH. Two hundred out of the 500 may have been done fraudulently. Is that correct?

Mr. CATTANY. That's correct.

Senator WIRTH. Do you have any sense of how much of the land involved, therefore, might have been transferred? I mean, $2.50 an acre is bad enough. Adding insult is the fact that 40 percent of it might have been fraudulently transferred.

Mr. CATTANY. Because I do not have the listing in front of me of the acreage with those 202 claims, I am not sure. My guess is that—I am just not quite sure whether it would be comparable or not, an across-the-board percentage.

Senator WIRTH. Counsel tells me that there are roughly 160 acres per claim, so that would be about 32,000, 35,000 acres out of the 82,000.

Mr. CATTANY. That's right. So, it would be about 40 percent.

Senator WIRTH. So, it would be approximately 40 percent of that.

What is the best way to get a handle on that? Should we ask the GAO to come back and dig out if in fact these were fraudulently transferred? What is the optimal way of getting a handle on that?

Mr. CATTANY. It is my understanding, if I recall properly, that there was a GAO audit—there was a study that was done at the time on those, and I think that what we need to do is go back and pull that study out.

Senator WIRTH. Well, let's do that. Let's go back and take a look at that again. That would certainly be an added benefit.

Well, Mr. Cattany, we thank you very much for being with us, for coming in and sharing your careful analysis of the situation. And once again, I want to commend you on the very constructive role that the State of Colorado has taken in this in trying to be an honest broker among all of the competing interests in this and also trying to advocate the future of this resource which I think is an important item to do.

And we would like to stay in touch with you. It looks as if we are moving toward a legislative solution, either legislatively here or, as you know, under the reconciliation process. So, that may be happening quite rapidly. And I hope we can depend upon your availability by telephone or mail or whatever. Thank you very much.

Mr. CATTANY. We appreciate the effort of your staff as well.

Senator WIRTH. Thanks ever so much, Mr. Cattany.

We have been joined this morning by Senator William Armstrong, the distinguished senior from the State of Colorado. Bill thank you very much for coming over. We appreciate your coming by. We are all working to see if we can untangle this. We just heard a very good presentation from Mr. Cattany from the State of Colorado. Assistant Secretary Hughes was here a little bit earlier, who is from the Department of the Interior, who is taking a very different view from what was taken earlier to see if we can get this thing worked out. And it look as if we seem to be headed in that direction, and I know how interested you have been in this issue. And I am very pleased that you were able to come over this morning. Thank you very much.

STATEMENT OF HON. WILLIAM L. ARMSTRONG, U.S. SENATOR FROM COLORADO

Senator **Armstrong**. Mr. Chairman, thank you very much. I didn't quite hear whether you said distinguished or extinguished Senator from Colorado, but your graciousness in welcoming me and, in fact, in permitting me to come on short notice is really above and beyond the call of duty because in the first place, I had not requested to testify at this hearing and did not even know about it until a few minutes ago, and second because, as I think you know, I am not going to testify in support of your bill. I am going to testify against it.

And so, let me just acknowledge at the outset your courtesy and remind anyone who might read the record of this proceeding that there are issues about which reasonable men will disagree. And there are a lot of issues upon which, as colleagues representing the State of Colorado, we do agree. This is one where I think we have a completely different point of view. I hope there will be a way in which we can reconcile our differences of opinion, but in this particular case, I just completely disagree with the reasoning as well as the probable effect of the legislation which is being heard this morning before the committee which, according to what I have just learned within the last few minutes, is S. 30 which is similar to legislation that has been under consideration in the House as well.

Mr. Chairman, rather than taking a long time to discuss it, I would like to submit later in the day, but before the day is over, a written statement of my concerns, but let me just tick off briefly why I have opposed similar legislation in the past and why I would continue to oppose what I understand to be the purpose and content of this bill.

First of all, it seems to me that this legislation proceeds from an understanding of the facts which is simply out of kilter. The bill starts from the presumption that there is a fire sale going on. I think that is rhetoric that I have read someplace, that somehow we are giving away Federal land. I do not think that is true. There are quite a number—and I think I have in my notes here someplace what that number is, but there is a large number of unpatented claims.

Now, if in fact those are owned by the Government, then we do not need this legislation. If they are not owned by the Government—and that is my belief—I think there is a valid, well-recognized property right in these claims. To take it away from them on the grounds that the fee involved is too low is unfair because what we are really talking about is a registration fee. We are not talking about selling land. We are talking about registering an ownership interest which already exists.

So, with that in mind, let me just emphasize several points, first, that I do not think we are selling land. I think we are registering land, and I believe that that is consistent with the interpretation of over 100 years of the 1872 mining act.

The general mining act of 1872 provided that once a claim has been located, and until a patent has been issued, not less than $100 worth of work shall be performed or improvements made each year. Under the Mineral Leasing Act of 1920, oil-shale lands were withdrawn from claims and oil became a leasable mineral. Proponents of this legislation, as I understand it, claim that some oil shale claims have let 20 or 30 years go by without the required annual $100 of work each year.

Unfortunately the argument that the required assessment work has been neglected is, in my opinion, unfounded. To be considered a valid claim, certain requirements must be met. The Supreme Court in the case of *Ickes* v. *Virginia-Colorado Development Corporation* determined that assessment was not required after passage of the 1920 Mineral Leasing Act on valid oil shale claims until at least 1935. Federal regulations did not require proof of annual labor until the 1970's. With the passage of FLPMA in 1976, the status of filing work changed and proof of annual labor was required to be filed with the Bureau of Land Management. Regulations on these reports were issues in 1977, and so it is clear that notices of annual assessment have to be on file since the late 1970's in order to have a valid claim. If the work was not done each year and affidavits were not filed, the claim would no longer be valid. But since a valid claim is a private property right, in my view we should not go back—perhaps we cannot go back, but certainly we should not go back—and preempt any valid claims that now exist.

Other issues that arise in this if not in the hearing today—and I am sorry I was not here to actually hear the earlier presentations, but what I have read about this, particularly in the popular press, indicates that there is going to be some kind of uncontrolled development resulting from the existing oil-shale claims. And I think that overlooks the fact that our State has both local and State zoning and reclamation laws, and the area in which most of these claims exist—that is, Rio Blanco and Garfield Counties—have impact mitigation ordinances to deal with the various socioeconomic impacts.

So, in summary, I think that this is unfair, and I have no objection to changing the rules prospectively, but I very much object to changing them retrospectively. As I understand it, this imposes a deadline of January 15, 1989 for filing patent applications, and there are at the present time, according to figures we have, 1,600 unpatented claims covering 253,000 acres. As of January of this year, only 14 applications for 342 claims covering about 53,000 acres were pending. The rest of these people have not submitted their applications and they will lose their right to patent their claims.

Now, somebody could argue, and I believe it would be fair to say, that it isn't very likely that all of these are going to be filed.

Maybe only a small portion of them are going to be filed. If that is true, if most of the other 200,000 acres will not be filed on, then we do not need a bill like this. But if, in fact, there is a real prospect that there will be filings on these acres, then we are taking away a property right. And I don't think we ought to do it. I just do not think it is fair.

So, Mr. Chairman, I won't detain the committee any longer other than to ask, if it has not already been done, that a letter regarding the bill from UNOCAL be entered in the record, and possibly that has already been done. If not, I ask that it be included.

Senator **Wirth**. Without objection, so ordered.

Senator **Armstrong**. Mr. Chairman, let me conclude as I began by acknowledging that particularly to take an unscheduled witness on short notice to bring hostile testimony is more than courtesy and it is recorded in my heart that you have extended me this courtesy. And I regret that we are not in agreement about the bill. But I hope we can compose our differences, and until we can do so, I hope that the committee will hold on to this legislation.

[The prepared statement of Senator Armstrong and additional material follows:]

STATEMENT OF
SENATOR WILLIAM L. ARMSTRONG
BEFORE THE
SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
JULY 31, 1989

I strongly disagree with S. 30, the Oil Shale Mining Claims Conversion Act. The reasoning in support of this bill is inconsistent with the facts. If this bill becomes law, this long standing dispute will not be solved. This bill will merely exacerbate the current legislative and legal conflicts surrounding the issue and no doubt open a round of new litigation.

If we are going to amend the 1872 Mining Law, and the 1920 Mineral Leasing Act, let's do it fairly and with the recognition that there are valid claimholders whose private property rights will be violated if we do not act responsibly.

The rhetoric supporting this bill is simply misleading and inflammatory. So let's set the record straight. The property in question cannot have "for sale" signs hanging over it, nor can it be the object of a federal "firesale" or a "land giveaway" for the simple reason that the federal government does not actually own the land in question. If an oil shale claimholder is maintaining a claim as required by law, that claimholder equitably owns that claim. It is the claimholder' property.

The General Mining Act of 1872 provided that, once a claim has been located, "and until a patent has been issued therefor, not less than $100.00 worth of labor shall be performed or improvements made each year." Under the Mineral Leasing Act of 1920, oil shale lands were withdrawn from claims, and oil became a leasable mineral. Proponents of this legislation have claimed that some oil shale claims have let 20 to 30 years go by without the required $100 worth of assessment work.

Unfortunately the argument that the "required assessment work" has been neglected by some valid claim holders is simply unfounded. To be considered a valid claim, certain requirements must be met. The Supreme Court, in Ickes v. Virginia-Colorado Development Corporation, determined that assessment was not required after passage of the 1920 Mineral Leasing Act on valid oil shale claims, at least until 1935. Federal regulations did not require proof of annual labor until the 1970's. With the passage of the FLPMA in 1976, the status of filing work changed, and proof of annual labor was required to be filed with the Bureau of Land Management. Regulations on those requirements were issued in 1977. It is clear that an unpatented oil shale claim, to be valid, must have had notices of annual assessment filed since the late 1970's. If the work was not done each year, and affidavits were not filed, the claim would no longer be valid. But, since a valid claim is a private property right it must be respected by the federal government.

Other words and phrases used to describe the need for this bill arouse, but do not fairly inform, the public. Mention has been made of potential uncontrolled subdividing of patented land, the loss of any future mineral revenues to county governments, and environmental damage. This reasoning ignores the facts. Colorado has state and local land use and reclamation laws. And Rio Blanco and Garfield Counties, where so much of the oil shale is located, have impact mitigation ordinances to deal with socio-economic impacts of any large energy mineral deposits.

If we are going to amend the mining laws of this nation we must do it equitably. No matter how unpalatable some may find the right to patent, that is the law of the land, and Congress should not change it in a way that wipes hundreds of property rights off the map of Werstern Colorado. If these commitments are to be changed-- if we are going to change the terms of a binding contract-- then we must give the parties with who we contracted fair notice. Claimholders, who in good faith have maintained their claims as required by law and directed by the courts, deserve fair notice of a change in their longstanding contracts with the federal government.

This bill retroactively imposes a deadline of January 15, 1989 for filing patent applications. Currently, 1,600 unpatented claims covering 253,685 acres are in existence. As of January 25, 1989 only 14 applications for 342 claims covering 53,963 acres were pending. The rest of the claimholders who have not submitted their application will lose their right to patent their claims. Proponents of this bill believe that a retroactive deadline would somehow prevent a rush of patent applications. However, if there were going to be a rush of patent applications, I should think that it certainly would have happened after the Tosco settlement, or since May 1987 when the Senate imposed a ten month moratorium on the issuance of patents, but not on the acceptance of patent applications. If Congress actually changes the law to state that valid claimholders will not be able to obtain patents, claimholders deserve fair notice, and an opportunity to file for a patent if they choose to do so.

Proponents of this legislation also claim that this bill is fair to those who want to develop oil shale. However, I am hard pressed to understand this reasoning. S. 30 would punish law abiding citizens by prohibiting valid claimholders from patenting their claim. The legislation would then require these claimholders (within 180 days of enactment) either to convert their claim to a lease and pay 12 1/2% royalties, or to continue to maintain their claim at an assessment value 10 times higher than under current law. The other option they are given by this legislation is to abandon their claim. It is clear that this legislation simply amounts to a confiscation of claims, and fairness to the claimholders is not considered.

Further, the legislation would forbid the Secretary from issuing or approving any lease under the terms of the Mineral Leasing Act to any entity that holds an oil shale mining claim. A defensible explanation of why oil shale claimholders should be banned from mineral leasing has yet to be offered. At this point I would like to include a letter from Unocal which shows the impact this section of the bill can have on Colorado.

Mr. Chairman, if no valid claim exists, then the land is the federal government's and there is no point to this legislative exercise. However, if valid claims do exist, then fair notice must be given if we intend to change the terms of contracts that have been existence for more than 100 years.

I would like to thank the Committee for this opportunity to present my views and I respectfully request that an editorial from the Grand Junction Daily Sentinel, and a letter I recently sent to Secretary Lujan, be included with my testimony.

FROM UNOCAL PARACHUTE [illegible].28.1989 12:41

Unocal Energy Mining Division
Unocal Corporation
2717 County Road 215, PO Box [illegible]
Parachute, Colorado 81635
Telephone (303) 285-7600

UNOCAL 76

Allen C. Randle
Vice President, Oil Shale Operations

April 3, 1989

The Honorable Tim Wirth
United States Senate
Washington, D.C. 20510

Dear Senator Wirth:

I have recently made a thorough review of S. 30, the Oil Shale Mining Claims Conversion Act (101st Congress). I want to express significant concern about this legislation and especially the Section 4 provision, "prohibition on lease issuance."

Upon reading the legislation, my initial interpretation of Section 4 was that the language must surely apply to oil shale leases issued pursuant to the legislation. But on rereading the proposed statutory language, and checking with our attorneys, the legislation has been drafted to have a much broader and significant effect. As currently drafted, Section 4 would prohibit most resource companies, major and minor, from acquiring any leases for any mineral under any provision of the Mineral Leasing Act simply because they hold oil shale mining claims (whether patented or unpatented).

As you know, acting upon the invitation of Congress and the Government, numerous companies hold oil shale claims. In the case of Unocal, we have acquired numerous claims over the years and have spent $1.1 billion to develop and produce oil from shale resources. In short, we acted in good faith reliance upon existing law and the government's encouragement to develop oil shale.

Section 4 of your bill would be punitive, unfair, and put our substantial investment at Parachute in jeopardy and would strike a significant blow to the 4100 Coloradans who rely on Unocal for their livelihood. I respectfully request that you revisit the provisions of this legislation, and especially the language of Section 4. I would be happy to discuss this matter with you in greater detail should you require a more detailed explanation of our concern.

Sincerely,

Allen C. Randle

Allen C. Randle

ACR:lra

cc: Governor Roy Romer
Senator William Armstrong
Representative Ben Nighthorse Campbell
Commissioner Peggy Rector

The Sentinel's editorials

Patent this position

Rational public debate is the exception, not the rule, on western public lands issues, particularly in the halls of Congress. But hardly is there any debate more irrational than that surrounding the ongoing controversy over oil shale lease claims under the 1872 Mining Law.

As was the case a couple of years ago when 82,000 acres of arid, juniper- and sagebrush-covered Piceance Basin land was at the heart of a political dispute over the 1872 Mining Law and 1920 Mineral Leasing Act, all manner of deceptive buncombe is being used to portray oil shale leaseholders as greedy, rapacious usurpers of a natural trust.

What a crock!

Most of the florid misinformation — outlandish demagogy couched in terms of "fire-sales," "public rip-offs," "land giveaways" — is manufactured by the National Wildlife Federation and other environmental groups. Colorado Sen. Tim Wirth and 3rd District Rep. Ben Campbell have opted to press the National Wildlife Federation's position in Congress, something we don't begrudge either man. The two, after all, are representing a constituency that, for the most part, finds its greatest comfort within the Democratic party. We merely disagree with them.

Thus, in the interest of ensuring equally heated rhetoric in expressing the other side of the issue, Western Slope residents would do well to view efforts in Congress to deprive longtime oil shale claimholders of their patent rights as a "double-cross," "congressional treachery" and an "unfair taking of property without just compensation or due process of law."

At issue is congressional legislation that would prohibit the federal government from validating patent claims to approximately 300,000 acres of oil shale lands in Colorado, Wyoming and Utah for the admittedly attractive sum of $2.50.

While the environmental community likes to portray the patents as a public land giveaway, it is anything but. The fact of the matter is that there is nothing for the federal government to "give away" if the existing claimholder has followed terms of the 1872 Mining Law in maintaining a claim. The claimholder, ergo, would equitably hold the claim, not the federal government.

The oft-repeated $2.50 "fire-sale" price is pure hokum. In reality, it is a filing fee to obtain legal title to the claim already owned by the claimholder.

As we argued two years ago, it's hard for us to find anything inherently sacrilegious about pre-1920 claimholders being allowed to patent claims according to the terms under which they initially filed their claims. Fair's fair.

That's the position staked out by Colorado Sen. William Armstrong. Armstrong would do well to patent his position. It's the right one. However, that doesn't necessarily mean he's likely to get the Senate to go along.

MAY 15, 1988 GRAND JUNCTION SENTINEL

WILLIAM L. ARMSTRONG
COLORADO

United States Senate
WASHINGTON, D.C. 20510

March 20, 1989

The Honorable Manuel Lujan
Secretary of the Interior
18th and C, NW
Washington, D.C. 20240

Dear Manuel:

Thank you for talking with me recently about the oil shale issue. Many of us believe that private property rights and contractual rights with the United States government are at issue.

Oil shale claims in Colorado, Utah and Wyoming total approximately 252,000 acres. A valid mining claim is private property, so "a giveaway of federal lands" is not possible. In addition, the $2.50 per acre is a patent application filing fee, so "a firesale of federal land for $2.50 per acre" is not possible. Those using such phrases are using misinformation and emotionalism that will erode property rights.

In the four times the Supreme Court has reviewed oil shale claim issues, it has never found an oil shale claim invalid due to arguments brought by the government. The history of this issue in the courts has been a sweeping rejection of the anti-oil shale campaign, and a broad affirmation of the rights of claimholders who have satisfied the century-old congressional requirements to obtain patents.

Mr. Frank Winegar is a sad example of the government's treatment of claimholders. Mr. Winegar applied for a patent in 1958. In 1980, the Supreme Court directed that Mr. Winegar be issued a patent. That patent was not issued until 1987.

The recent suit Tosco v. Hodel is also representative of the unfortunate history of litigation against oil shale claimholders, so costly in energy, money and time -- the government's and the claimholders'. In 1961, Interior reversed its position and began contesting patent applications for oil shale claims. This policy reversal triggered 25 years of Tosco litigation, ending with the Finesilver decision May, 1985.

Earlier in the decade, Judge Finesilver ordered Interior to proceed with oil shale patent hearings for the purpose of finally bringing all charges by the government into a single proceeding. The claimholders pursued administrative procedures and appeals at Interior before going back to court. Tosco represented four lawsuits challenging rulings by Interior that the pertinent oil shale claims were invalid.

The court examined every argument the government had presented over the years to deny patents, and ruled against the government on every count. So not only did the government lose on the two basic issues (discovery and assessment work), but on numerous angles regarding those issues.

The decision directed the government to transfer all title to property due the claimants under a patent, including oil shale, coal, rights-of-way, sand and gravel, grazing and hunting rights, oil and gas, and the surface. Despite their judicial victories, however, the claimholders agreed to a negotiated settlement because they desired final resolution of this issue.

And current claimholders desire final resolution of this issue, which is costing them dearly in spirit and money. I believe approximately 12 oil shale patent applications are before Interior now. Six were filed within the past year, while the other six were filed between 1982 and 1986.

I understand that the six earliest filed all have received the first half certificates, three as early as 1984, and that what remains for the second half certificates and granting of a patent is field work determining mineral discovery.

This session, bills purporting to resolve the oil shale claims issue have been introduced in the House and Senate. But, these bills are confiscatory and, if passed, will only force claimholders to go to court. A valid claim is private property. These bills would not only retroactively deprive claimholders of a chance to apply for a patent, but deny existing patent applicants their right to obtain a patent on a valid claim if patent requirements were not fully met by a date last January.

In addition, S. 30 would forbid you from issuing or approving the assignment of any lease issued under the Mineral Leasing Act of 1920 to any party holding an oil shale mining claim located under the Mining Law of 1872. This provision was represented to my staff by the sponsor's staff as a "bit of humor". I can assure you that the humor does not exist -- one company in Colorado has invested more than $1 billion of its own money developing an oil shale processing plant. This company provides more than 500 jobs on Colorado's economically stricken West Slope. That company not only has numerous federal mineral leases for other minerals, but holds unpatented oil shale claims.

If the claims they hold are valid and S. 30 passed, keeping their own private property could jeopardize their business involving other federal mineral leases (no small investment in themselves). They would face the prospect of giving up their claims, and their sincere efforts to refine technology to realize the potential of oil shale as a vast national resource would be lost, as would the company's astounding capital investment and an economic force in Colorado.

Existing law directs processing of patent applications and issuance of patents for valid claims. Yet patent applicants continue to be subject to delay, despite existing law and despite numerous court victories regarding rights of claimholders.

Congress has had 70 years since the Mineral Leasing Act of 1920 to address the issue of oil shale claims. Last year, despite the Senate oil shale bill being introduced by the majority party, heard by a committee on which the bill's sponsor sits, in a time when environmentalists wield influence, the legislation did not come to the floor.

The misrepresentations and sensationalism that are skillfully used to characterize this issue cloud the real point: a valid claim is private property in the truest sense. That is why I suspect a number of Senators will greet this issue on the floor as they have each year it has presented itself. We will oppose the government breaking its contract retroactively or with little notice, denying rights under law, and creating a "resolution" which only drives the issue back to court. Neither claimholders nor the government can afford the tremendous expense of renewed litigation of issues which the Supreme Court has addressed four times, never finding an oil shale claim invalid, and which were again addressed in 25 years of litigation which culminated in 1985 in yet more victories for claimholders.

I repeat, what claimholders desire is a fair and final resolution of this issue. Consequently, last year, the State of Colorado sat down with claimholders from Colorado and Utah, and local elected officials of Colorado's West Slope to negotiate compromise legislation that could resolve this issue. The compromise contains some aspects of the Tosco settlement at this point, leaving to the claimholders only oil shale and associated minerals with access to mine. This developing compromise has been a bipartisan effort, with Colorado's Democrat Governor and West Slope Democrat officials participating.

I suggest that a bipartisan compromise achieved by states, claimholders and officials representing the socio-economic interests of the region is a good starting point. I note also that, even if the surface were to be patented to the claimholder, the local and state land use regulations are so specific that zoning dictates use of the land. Also, on most of those lands which have been patented and those lands involved in the Tosco settlement, the state and local governments have reached agreement on access rights for hunting and grazing.

But, I must ask, what is the "other side" giving? The valid claimholders discussing compromise are willing to relinquish their right to the ownership of the surface and all minerals, except oil shale and associated minerals. Environmentalists are objecting to even this, and seeking drastic revision in claim validity reviews and a reopening of the Mining Law of 1872. Time and time again parties in good faith come to the bargaining table to achieve compromise. Once compromise is achieved and an agreement reached, it is deemed "not enough", whether those objecting were part of the final settlement or not.

Reopening the Mining Law of 1872 presents grave dangers. Given the current influence of parties opposed to multiple use and mineral development on our federal lands, reopening the Mining Law would provide them an opportunity to cripple future development of our nation's mineral resources. Already our development of multiple resources, such as minerals or timber, can be easily hamstrung by seemingly endless appeals, ignoring land management professionals' decisions and devastating communities' economies.

I wanted to write and give you a brief history of the oil shale claims issue, and share with you the importance of giving claimholders a fair and final resolution. Whatever other issues may concern people -- for example, the nominal amount of the filing fee, the extent of rights patented -- should not ignore existing rights of valid claimholders, whatever the mineral resource. And those issues should not be allowed to be framed in such a way that sensationalism and inaccuracy cloud miners' existing rights.

Thank you for your consideration of this matter. Please do not hesitate to call if you wish to discuss it further.

Best regards.

Sincerely,

-- signed --

William L. Armstrong

WLA/ck

Senator **Wirth**. I appreciate your being here, and I was not unfamiliar with the position that you have taken on this particular piece of legislation and the issue.

As the previous witness was pointing out, we are attempting to sort our way through how to deal with a lot of previous questions related to whether or not a lot of these patents are valid. Have they been done in a legal fashion? There has been litigation about this for 60 years. Many of these patents have had 60 years to meet the requirements apparently and, according to any number of analyses, have not done so.

The Department of the Interior in Washington against the advice of their own staffs in Colorado decided to make the decision to issue the patents in 1986, and that was even after many of us had urged them not to do so, to hang on until we really sorted which were valid and which weren't.

As you are very familiar, many of us were deeply concerned and the word "fire sale" was used by me at a time when I discovered that this land which had been transferred to $2.50 an acre was turned around and sold for more than $2,000 an acre, and that there was a windfall of well over $30 million that came out of what it appears to me to be a fire sale of Federal land when, in fact, we could have worked out a lot of these issues and were a couple of years ago getting pretty close to doing so.

I hope that we are going to be able to work those out now. And the suggestions made by Mr. Cattany, for example, related to what the provisions of this ought to be, the items that we're trying to work through now. I think we are getting close. We were pretty close before and then it all fell apart, and I hope we can do it again.

Senator **Armstrong**. Well, Mr. Chairman, obviously it is just absolutely evident that when I depart, you are going to get the last word. So, I am not going to try your patience. But this isn't a fire sale. If they are valid property rights at the present time, then they are owned by the private people involved, and nothing is being sold. It is just a recording fee. It is kind of like the recording fee that you pay to record a real estate transaction. You go out and buy a house for $100,000. You take it down to the county clerk and you record the paper.

Now, I think that is analogous to what is occurring here. To the extent that someone who has a claim has not provided the annual work, then they have not got a valid private property right. So, to that extent, retroactive legislation is not needed. To the extent that they actually do have and could, in fact, prove their right, all we are talking about is a recording fee. So, the notion that a windfall occurs—I just don't think that is correct.

The best analogy that I know of concerns someone in my own family. My mother-in-law about 60 years ago moved out onto the plains of Wyoming long before I knew her, of course. In fact, when my wife was about three years old, she moved out onto the plains of Wyoming and homesteaded. And she lived on that property for whatever the required time was. I guess five years. And then she filed for it, and it became hers as a matter of property right, and she sold it.

Now somebody, when she came to file her claim, could have said, well, this is a windfall. For $1 or $2 or $10, whatever it was, she is getting this vast acreage. And I forget how many acres it was. It was 5 or 10 I guess. But whatever it was, she got it as did thousands—hundreds of thousands of other people throughout the west.

That is what we are talking about here is a law which has been on the books for 100 years under which people have qualified to own property and now they want to record their ownership, not gain ownership, but only record it.

Well, again, my thanks. I wish you much success in trying to sort it out in a way that we can either agree on this or at least that I can remain silent.

Senator WIRTH. I do not disagree when somebody, as your mother-in-law, has met all the requirements of the law. That is fine. In this situation here, there is a long history of court cases——

Senator ARMSTRONG. Including some that the patent holders won.

Senator WIRTH. That makes it very clear that equitable title does not vest—and neither you nor I are lawyers, but we can sit here and try to look at this—until all the requirements of the mining law are fully complied with. And that is the issue. And that is where the debate has occurred.

Senator ARMSTRONG. If they have not fulfilled the requirements of the law—let me just say this one more time because this is really the central issue. If they have not fulfilled the requirements of the law, then they do not own anything, in which case this legislation is not really necessary. If they have fulfilled the requirements of the law, then the property right has vested and in that event, to preempt them is in my view a taking. And whether it is an unconstitutional taking I do not know. Maybe it is, maybe it isn't. But it is a wrongful taking in my view.

Senator WIRTH. And the remaining issue is have they met the requirements of the law and, if not, how has the Interior Department acted in the past that assumes that they have met the requirements and transferred the land? And that seems to me is the remaining——

Senator ARMSTRONG. Well, in the Interior Department if somebody wants to argue the case that the Interior Department has acted improperly and wants to discipline the Interior Department, I have no problem with that. I do not have any dog in that fight. If somebody wants to say we should not have such a policy in the future, I have no problem about changing that. And, in fact, whatever changes you make with respect to the future, I am not indifferent to it, but it is just not a big issue.

But with respect to the past, whether it is 14 claims or 1,600 claims or 6 claims or only one, if somebody has a property right, Congress should not preempt it, should not take it. And we are not the finders of fact. It is up to some court to determine whether or not they have in fact done their job.

Thanks again for your courtesy.

Senator WIRTH. Thank you very much, Senator Armstrong. We appreciate your being here.

If we might have our final three witnesses join us at the table. We have Mr. David Alberswerth, resource specialist of the public lands and energy division of the National Wildlife Federation; Mr. Marshall Savage from Rifle, CO; and Dr. John Davis, the director of exploration and production for Marathon in Washington, DC. Mr. Alberswerth I understand is accompanied by Kathleen Zimmerman who is counsel to the Wildlife Federation, and Mr. Davis by Mr. John White, counsel of Patton, Boggs & Blow and I believe formerly with a very distinguished career with Marathon.

Thank you all very much for being here. You all have heard the discussion. You have seen the issues in front of us. Perhaps we might just go right down. We will include your statements in full in the record. And maybe we could just start with you, Mr. Alberswerth. And why don't you summarize and perhaps comment on what was said earlier in whatever way you think would be most helpful, and then, Mr. Savage, go to you, and then finally to you, Dr. Davis?

STATEMENT OF DAVID ALBERSWERTH, DIRECTOR, PUBLIC LANDS AND ENERGY DIVISION, NATIONAL WILDLIFE FEDERATION, ACCOMPANIED BY KATHLEEN C. ZIMMERMAN, COUNSEL

Mr. ALBERSWERTH. Thank you, Mr. Chairman. I appreciate the opportunity to be here today, and I also want to commend you personally on your leadership on this issue in the Senate. I hope this year we will be able to resolve it finally.

I have with me today, as you noted, Ms. Kathleen Zimmerman who has testified before this subcommittee in the past on the subject of valid existing rights. If there are some questions that you would like to explore on that particular issue, I would suggest that you direct them her way.

We have been concerned about this issue for a long, long time. Both bills before the subcommittee we think represent generous compromises and good solutions to the problem of these oil-shale claims, all of which predate the 1920 Mineral Leasing Act.

Both bills are similar in many respects. There are some significant differences, however. In particular, H.R. 2392 provides for the granting of patents to the mineral only upon payment of $2,000 per acre for those individuals or entities that applied for patents after the date of introduction of the bill.

We believe that both of these bills are extremely generous compromises to the claimants. On the one hand, persons holding valid claims have the right to develop oil-shale protected. That is the point of these claims in the first place presumably. And in the second place, the public is assured that there will be no more giveaways of valuable public lands under the guise of the 1872 Mining Law.

I would like to make two suggestions about improvements in S. 30. First we recommend that section 3(c) be amended to provide claimants the opportunity to make payments in lieu of annual assessment work. Such payments would be made on a yearly basis, be nonreimbursable and set at a level to reflect the monetary value of the assessment work otherwise required. Second, we suggest that the $1,000 annual assessment work requirement be raised to not less than $5,000 as per H.R. 2392.

I have one other point I would like to make and that is in response to Mr. Cattany's statement. Neither of the bills contain any criteria for validity determinations, and Mr. Cattany I believe described very aptly the problem in assessing the validity of a lot of these old claims. I know that it is very difficult for Congress to write in specific criteria in the detail probably warranted, but perhaps report language in the development of this legislation could at least clarify some of the types of criteria that Congress believes the Department should include when they are doing their validity determinations, such as whether the claims are validly located in the first place and whether annual assessment work was actually performed on a yearly basis prior to 1971.

Thank you very much.

[The prepared statement of Mr. Alberswerth follows:]

Working for the Nature of Tomorrow®
NATIONAL WILDLIFE FEDERATION
1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

STATEMENT OF

DAVID ALBERSWERTH, DIRECTOR

PUBLIC LANDS & ENERGY DIVISION

NATIONAL WILDLIFE FEDERATION

BEFORE THE

SENATE SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

REGARDING S.30 AND H.R.2392

July 31, 1989

Mr. Chairman and Members of the Subcommittee, thank you for providing the opportunity to present the views of the National Wildlife Federation on H.R.2392 and S.30. The bills address the public policy dilemma posed by the existence of pre-1920 oil shale mining claims on the public lands. The National Wildlife Federation (NWF) is the nation's largest conservation education organization, with approximately 5.8 million members and supporters. We have a longstanding interest and concern about the proper stewardship of our nation's public lands and natural resources. We have been concerned about the disposition of these claims for several years.

NWF supports the policy declared by Congress in the Federal Land Policy and Management Act (FLPMA) that the public lands should be retained in public ownership. Unfortunately, this policy is undermined by the 1872 Mining law, an obsolete statute which was written at a time when it was this nation's policy to encourage the settlement of the West by giving away publicly-owned lands natural resources. It fails to recognize other multiple uses of the public lands and provides for disposal of public property at far less than fair market value - two other important policy objectives of FLPMA. The Department of the Interior's 1985 decision to settle the Tosco Corp. v. Hodel lawsuit by issuing 41 oil shale patents covering approximately 82,000 acres for the $2.50 per acre patenting fee stimulated public concern regarding the disposition of the approximately 253,000 additional acres of public lands still subject to oil shale claims. Both bills before this subcommittee represent conscientious attempts to deal equitably with this issue by protecting the legitimate rights of persons holding valid claims to develop oil shale, while protecting the public's right to expect proper management of the public lands.

The history of this issue has been explained thoroughly in hearings before this Subcommittee and the House Subcommittee on Mining and Natural Resources held in 1987 and 1988, and does not need to be repeated here. S.30 is identical in many ways to H.R.2392, which passed the House by an overwhelming and bipartisan majority. Both bills prohibit the future patenting of oil shale claims with the exception of those claims for which all patent requirements were met prior to the date of introduction. Both bills provide the same options to holders of valid oil shale claims: these claimants may choose either to maintain their claims in accordance with new assessment work requirements or to convert their claims to leases under the terms of the Mineral

Leasing Act. Both bills require reclamation of mined sites and surety bonds to ensure that reclamation is completed.

There are also some significant differences between the two bills. H.R.2392 grants limited patents of the mineral only to claimants who had done no more than file applications prior to introduction of the bill, while all other minerals and the surface estate is retained in public ownership. This provision is not present in S.30. S.30 raises the annual assessment work requirement to $1000 per claim per year. H.R.2392 requires the expenditure of "not less than" $5000 per year, and permits payments in lieu of assessment work. Finally, S.30 prohibits the issuance of oil and gas leases to claimants who choose to retain their oil shale holdings as claims, a provision not contained in H.R.2392.

Both bills represent an extremely generous compromise to the claimholders: persons holding valid claims have their right to develop oil shale protected, while the public is assured there will be no more "giveaways" of valuable public lands under the guise of oil shale claims.

Both bills contain provisions protecting the legitimate rights of claimholders to develop oil shale. For example, claimants who possess valid claims and who met all patenting requirements prior to the date of bill introduction are entitled to patents under Sec. 2(f) of H.R. 2392 and Sec. 2 of S.30. For those claimholders who have not met this deadline, we believe that it is time to close the "window of opportunity" to patenting which has been open for 70 years. Nevertheless, under both S.30 and H.R.2392, claimants who have not met patent requirements prior to the January introduction date are still provided options to develop their claims (if found to be valid). They may continue to maintain their valid claims under modernized assessment terms, (S.30 and H.R.2392) or they may convert their valid claims under modified terms of the Mineral Leasing Act which are favorable to the claimants. There is no question that Congress is well within its Constitutional powers to raise the annual assessment work requirement. The 1872 Mining Law requires that claimants perform "not less than" $100 worth of assessment work each year (30 U.S.C. § 28). Further with respect to the lease option provided, unlike other oil shale lessees holders of valid claims who apply for leases are exempt from competitively bidding for oil shale leases, exempt from paying bonuses, and are exempt from the acreage limitations.

The terms described above are extremely generous to the claimants. After all, they have had over 70 years to produce oil shale from their claims and have not done so. Yet, despite the protections afforded persons with valid claims to develop oil shale afforded by the two bills, critics of the bills may argue that denying a mining claimant the right to patent a claim in the future constitutes a taking within the meaning of the fifth amendment to the Constitution. This is not the case, however. The Supreme Court has held that legislation readjusting rights and burdens is not unlawful solely because it "upsets otherwise settled expectations." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

Moreover, legislative precedents for the action proposed in H.R.2392 and S.30 are well-established. Congress repeatedly has been willing to preclude the issuance of mineral patents in legislation designating federal lands for special uses, and has been upheld in the courts in so doing. See, e.g., Sawtooth National Recreation Area Act of 1972, 16 U.S.C. Section 460aa et seq. (1982), Wilderness Preservation System Act, 16 U.S.C. Section 1131 et seq., Steese National Conservation Area and White Mountain National Recreation Area Act of 1980, 16 U.S.C. Section

460mm et seq., Oregon Cascades Recreation Area Act of 1984, 16 U.S.C. Section 460oo et seq.

For example, Section 460aa-11 of the Sawtooth National Recreation Area Act provides that:

> [p]atents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States.

Furthermore, the constitutionality of this provision was specifically upheld by the United States Court of Claims in Freese v. United States, 639 F2d 754 (Ct. Cl. 1981). The plaintiff in the Freese case was the holder of five unpatented mining claims located on federal lands within the Sawtooth National Recreation Area. He argued that Congress' action terminating the ability of holders existing claims to proceed to patent those claims located within the recreation area constituted an unconstitutional taking by inverse condemnation. The Court disagreed, noting that while the plaintiff's opportunities had been somewhat narrowed, plaintiff had not suffered a deprivation of private property within the meaning of the fifth amendment:

> The case before us thus ultimately reduces to the question whether plaintiff has suffered an unconstitutional divestment solely by virtue

> of the fact he no longer has the option to apply for patents upon his claims. Common sense dictates a negative response. At best, plaintiff has suffered a denial of the opportunity to obtain greater property than that which he owned upon the effective date of the Sawtooth Act. This cannot fairly be deemed the divestment of a property interest, save by the most overt bootstrapping.

The Wilderness Act as well as the other statutes listed above place similar limitations on the ability of present claimholders to obtain patent to the land upon which their claims are located. The proposals before the subcommittee today would do no more.

We have two suggested changes to S.30. First, we recommend that Section 3(c) be amended to provide claimants the opportunity to make payments in lieu of annual assessment work. Such payments would be made on a yearly basis, be non-reimbursable, and set at a level to reflect the monetary value of the assessment work otherwise required. Any failure to make such payments in any given year would result in automatic cancellation of the claim. The payment alternative would enable claimholders to keep their claims but not risk on-site environmental damage to public lands simply to meet the annual work assessment requirement.

And finally, we suggest that the $1000 annual assessment work requirement be raised to "not less than" $5000, as per H.R.2392. The $100 annual assessment work requirement which these claims are currently subject to was intended in 1872 to represent a significant expenditure of labor. In the late 1800s, the average individual's yearly earnings were about $480, and the average wage only $.20 per hour. At the time, $100 was roughly the value of labor which would be expended annually by one miner diligently working a claim in the summer months. Simply increasing the annual expenditure requirement to reflect current labor rates would place the annual work requirement over $5000, the value of assessment work or in lieu payments we are recommending.

This concludes my statement.

Senator **Wirth**. Thank you very much, Mr. Alberswerth.

Mr. Savage.

STATEMENT OF MARSHALL T. SAVAGE, RIFLE, CO

Mr. **Savage**. Mr. Wirth, I am from Rifle, CO, and I am representing my own Savage family and the Altenbern family. We own a number of unpatented oil shale claims in western Colorado.

Now, what I want to say to you today is almost absurdly simple. I am not a lawyer and I do not have any expertise in legal technicalities. But I am an oil shaler. I'm the son of an oil shaler, and he himself was the son of an oil shaler. And I do know what is just. For three generations my family and the Altenberns have owned oil shale land in western Colorado. We have owned it. We have possessed this land. It has been ours. We have gone upon it. We have worked it. We have bought it. We have sold it. We have willed it. We have inherited it. We paid taxes on it. It is our land.

Now, you can go to legal libraries and find whole shelves devoted to the law of private property, but I am not talking about the minutia of the law. I am talking about an absolute principle of justice. You cannot make a law today which deprives me of my property for something I failed to do last Tuesday. Now, this is just what this bill 2392 says to the claim owners. It basically says if you do not have a complete patent application on file as of January 1989, then you forfeit your property.

Now, I am in the position I have to explain this law to Orville Altenbern who put his trust in me to file a patent application on his behalf. I filed Orville's application April 1988. So, he thinks that his claims are all right. No, Orville, I have to explain, when they say a complete application, they mean including a final certificate which is a bureaucratic formality that only can be performed by the Department of the Interior. So, Orville, you will never get patent to your claims, but you can get a lease or elect permanent unpatented status, but neither one at a price you can afford. Unfortunately, your surface rights and all your other mineral rights are confiscated as soon as this bill becomes law.

Now, Senator, you have not lived until you have tried to explain this kind of law to an 85-year-old rancher who has spent the better part of every spring since 1924 pouring sweat, diesel fuel, and cash into the improvement of his claims.

Orville Altenbern has owned his land for more than 65 years. He and his sons and his grandsons have worked their claims without interruption for that entire span of time. They have built roads. They have dug assessment pits. They have hunted, cut timber. They have done everything that a man can do in the enjoyment of his property, and they have paid taxes besides. If Orville Altenbern does not own the Steamboat claims, there is no such thing in this country as private property.

Now, the courts have clearly held that unpatented oil-shale claims are private property. As Chief Judge Sherman Finesilver of the U.S. District Court for the District of Colorado said in his landmark 1985 ruling on oil-shale claims, claims which are virtually identical to those owned by ourselves and the Altenbern family—and I quote:

> Upon a valid discovery being made and proper location, a mining claim is real property and, although legal title to the land remains in the United States, the mining claimant enjoys a valid, equitable, possessory title, subject to the taxation, transferrable by deed or devise and otherwise possessing all incidents of real property. This title cannot be unreasonably or unfairly cancelled at the unbridled discretion of the Interior Department.

Now, much ado has been made in the press and in the Congress about the giveaway of public lands for $2.50 an acre. These lands are not a part of the public domain. They are not now, and they have not been since 1917. These lands are private property. The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use, without just compensation."

I ask the subcommittee, the full committee and the Senate not to use its power to simply confiscate our property in the manner of this bill. Even if such a law were to survive the inevitable constitutional challenge that it will face, it would still do a great injustice.

All that we are seeking in our patent applications is the same treatment that was obtained for over 2,800 other oil-shale claims that have been patented since 1920. Now, we believe that we will prevail in the courts, but we claim owners hope that we can avoid more litigation. It was in the hope of avoiding the expense and delay of litigation that at hearings before you last year my brother, John Savage, and other claim owners indicated that they would accept as a compromise legislation that would restrict recently applied for patents to oil shale and associated minerals. Assuming we had a right to use the surface for oil shale development, we would be willing to forgo title to the surface and other minerals.

We can go no further than that and still retain anything of any value. Please do not follow the confiscatory approach of this bill. That approach would only extend, it would never conclude the oil-shale mining controversy. It is an unjust law and it will force us to resort to the courts.

Now, Senator, if I could just summarize my statements with a brief illustration. In our view and in the view of the courts what the government holds is title to our property. It is exactly analogous to having bought a house in 1917, and you have a contract for that house with the bank and the bank holds your title. And in the contract it says at closing transfer of title will cost you $2.50, which may have been a reasonable title transfer fee in 1917. And then for 70 years the bank refuses to grant you title to your house. Then finally under the coercion of the court, the bank finally agrees to transfer you your title and you pay the requisite price as specified in the contract.

Senator, that is not a ripoff; that is simply the final obeyance of the law. And all we are asking is that we be granted title to our property.

Thank you.

[The prepared statement of Mr. Savage follows:]

Testimony of Marshall T. Savage before the
Subcommittee on Mineral Resources,
Development and Production of the
Senate Energy and Natural Resources Committee
July 31, 1989

Good Morning. My name is Marshall Savage; I am from Rifle, Colorado, and I am representing the Savage and Altenbern families; we own a number of unpatented oil shale claims in Western Colorado.

I would first like to thank the Committee for this opportunity to speak to you directly. What I have to say to you today is almost absurdly simple. I am not a lawyer, and I don't pretend to an expertise in legal technicalities. But I am an oil shaler, and the son of an oil shaler, who was himself the son of an oil shaler. I may not know law, but I do know justice. For three generations, my family and the Altenberns have owned oil shale land in Western Colorado. Owned it! We have possessed this land and it has been ours. We have gone upon this land and we have worked it with our own hands, we have bought it, sold it, willed it, inherited it, paid taxes on it. It is our land. There are whole shelves in legal libraries devoted to the "law" of private property, but I am not talking about the minutia of the law, I am talking about the absolute principle of justice itself. One cannot make a law today that deprives a man of his property for something he failed to do last Tuesday; and then still pretend that such a law is just.

H.R. 2392 says to us, the claimowners, 'if you didn't have a complete patent application on file as of January, 1989, then you must forfeit your property'. Now I have to explain this to Orville Altenbern who put his trust in me to file a patent application on his behalf. I filed Orville's application in April of 1988, so he thinks that his particular claims are O.K. No, Orville, I have to explain, when they say a 'complete' application, they mean 'including a final certificate' which is a bureaucratic formality that can only be performed by the Department of the Interior. So, you will never get a patent to your claims. But you can get a lease or elect permanent unpatented status, but at a price you can't afford. Unfortunately, your surface rights and all your other mineral rights are confiscated as soon as this bill becomes law. Now, you haven't lived until you've tried to explain this kind of law to an 85 year old rancher who has spent the better part of every spring since 1924 pouring sweat, diesel fuel, and cash into the improvements of his claims.

Orville Altenbern has owned his land for more than 65 years; he and his sons and his grandsons have worked their claims without interruption for that entire span of time; they have built roads, dug assessment pits, hunted, cut timber, done everything a man can do in the enjoyment of his property and paid taxes besides. If Orville Altenbern doesn't own the Steamboat Claims, then there is no such thing as private property. But the courts have clearly held that unpatented oil shale claims are private property. As Chief Judge Sherman Finesilver of the U.S. District Court for the District of Colorado said in his landmark 1985 ruling on oil shale claims, which are virtually identical to the claims held by the Altenberns and my family:

> "Upon a valid discovery being made and proper location, a mining claim is real property and, although legal title to the land remains in United States, the mining claimant enjoys a valid, equitable, possessory title, subject to taxation, transferrable by deed or devise and otherwise possessing all incidents of real property. This title cannot be unreasonably or unfairly canceled at the unbridled discretion of the Interior Department."

Much ado has been made in the press about the "giveaway" of public lands for $2.50 an acre. These lands are not a part of the public domain; are not now and have not been since 1917. These lands are private property. The Fifth Amendment to the Constitution of the United States provides that private property shall not "be taken for public use, without just compensation."

I ask this Subcommittee, the full Committee, and the Senate not to use its power to simply confiscate our property, in the manner of House Bill 2392. Even if such a law were to survive the inevitable constitutional challenge it would face, it still would do great injustice.

We believe that we would prevail in the courts; all that we are seeking in our patent applications is the same treatment that was obtained for over 2,800 other oil shale claims that have been patented since 1920. But we claimowners hope that more litigation can be avoided. It was in the hope of avoiding the expense and delay of litigtion that, at hearings before you last year, my brother and other claimowners indicated they would accept, as a compromise, legislation that would restrict recently applied for patents to oil shale and associated minerals, with the right to use the surface for oil shale purposes.

We can go no further and still retain anything of value. I earnestly urge you not to follow the confiscatory approach contained in H.R. 2392. That approach would extend, not conclude, the oil shale mining claim controversies. It is completely unjust, and we would be forced to resort to the courts.

Senator **Wirth**. Thank you very much, Mr. Savage.
Dr. Davis.

STATEMENT OF DR. JOHN A. DAVIS, JR., DIRECTOR, EXPLORATION AND PRODUCTION TECHNOLOGY CENTER, MARATHON OIL CO., ACCOMPANIED BY JOHN S. WHITE, COUNSEL, PATTON, BOGGS & BLOW

Dr. **Davis**. Thank you, Mr. Chairman. I would ask that in addition to my comments, the submittal by the API, the American Petroleum Institute, also be included in the committee record.

Senator **Wirth**. Without objection. I will include that in the record, absolutely.

Dr. **Davis**. I am the Director of Marathon Oil Co.'s Exploration and Technology Center in Littleton, CO. I have been in charge of Marathon's oil-shale activities in Colorado for the past 3 years, and have been associated with its research, development and land acquisition matters for over 18 years.

My comments today are directed primarily to the necessity for legislation in order to end the disputes over oil shale claims that have gone on for these some 70 years. A congressionally sanctioned compromise is needed to settle the oil-shale problems once and for all. The committee must consider and pass fair and appropriate legislation that can be signed into law.

I urge a compromise approach to either S. 30 or H.R. 2392 to bridge the gulf between the various competing interests on oil-shale issues. To accomplish this objective and based on the testimony that you have heard from others today, I believe there are several principles that can be agreed upon, and that ultimately the result will be the development and production of oil-shale from these vast reserves.

First, there are pending before the Department of the Interior six senior oil-shale patent applications filed well before the 1986 processing moratorium. Marathon is one of those six. Mineral final entry certificates have been issued for the claims covered by five of these applications. The claimants' rights have vested. In 1987 Congress passed a law which recognized the specific applications and agreed as a matter of policy that they should be patented. That has not but should be done by the Department of the Interior forthwith.

Second, for all other oil-shale claims, including claims covered by eight patent applications filed in mid-1988, a different problem exists. As we understand the matter, those claimants have agreed that the ownership of the surface of those claims can remain with the United States subject to reasonable use for oil-shale development, and that they are seeking the oil-shale and associated minerals only.

This is a major concession by those claimants. If a mineral patent were issued, it would cover only the oil-shale section of the Green River formation. This compromise I believe achieves congressional objectives with both claimants and the Department of the Interior in efforts to settle some of the issues and to make the surface available for other public land use and the other minerals available for development also.

Third, many oil-shale mining claims are outstanding for which patent applications have not been filed. A period of time should be afforded those claimants to apply for a patent and the opportunity to prove patentability should they so desire. Indeed, we believe this is their legal right to do so.

Congress has established policy in the Alaska Native Claims Settlement Act and in the Federal Land Policy and Management Act to provide notice and a time in which a patent application and other documents could be filed or the opportunity and the claim would then be lost. In fairness, Congress should follow these precedents today. To our knowledge, Congress has never cut off the opportunity to apply for a patent in the manner set out in S. 30 or H.R. 2392.

Fourth, some definite schedule for filing and processing of oil-shale patent applications should be imposed on both the applicants and the Department of the Interior. Based on our experience, we know that self-imposed delay by the Department in working on oil-shale patent applications is the order of the day. Even where an applicant has submitted final proofs and where no legislative moratorium exists on processing, the Department has failed to act.

We strongly urge the committee to adopt provisions which will require an applicant to submit all final proofs for a patent within a reasonable but short period of time and that also requires the Department of the Interior to act on those proofs within an equally short but reasonable period of time. Otherwise, the problem of pending applications and unpatented mining claims may continue for additional decades. There is historic congressional precedent for these types of time obligations in the disposal of public lands.

There are several specific points in the two bills that need to be addressed. Both S. 30 and H.R. 2392 are framed in terms of elect or forfeit. Each bill takes a slightly different approach to a seemingly common objective: force the abandonment of oil-shale ownership. The election in S. 30 forces the oil-shale claimant to: one, take a 20-year lease with a royalty of not less than 12.5 percent on retorted shale oil if the claim is found valid, which may be extended yearly by commercial production; or to maintain the oil-shale claim under existing law, except that the claim shall be deemed conclusively abandoned unless the claimant expends $1,000 per claim per year for labor or improvements, and files annually with the Department verifiable proof of the expenditures, and forgoes all opportunity to participate in future oil, gas, oil-shale, or other mineral development on public lands of the United States.

S. 30 will amend the 1920 Mineral Leasing Act to deny any holder of an interest in an oil-shale mining claim the rights to obtain a new Federal lease for oil, gas, coal, oil-shale, phosphates, potassium, sodium and other components in any public lands of the United States.

Some holders of oil-shale claims are also in the Federal oil and gas and minerals exploration and development business. For them the prohibition and elect-or-forfeit edict is a Catch-22 situation. The election is to stay in or get out of the Federal leasable minerals business. This has little relationship to oil-shale development.

For H.R. 2392, the election process creates a nonvoluntary choice in that, one, the owner may apply for a 20 year lease to oil-shale and associated minerals which may be extended by yearly commercial production if within a 2-year examination the claim is held valid. Two, the owner may maintain the claim under new regulatory requirements in the absence of commercial production of oil-shale and associated minerals that mandate at least $5,000 per claim per year of assessment work or a payment of that amount annually to the Secretary, subject to forfeiture 100 years after the original location.

Viewed in the most favorable light, the oil-shale claimant is granted a new estate for 30 years, most of the claims having been located in the 1917–19 era, based on payment of $5,000 per claim per year—that would be $150,000 total—subject to defeasance at any time. If all claims were maintained by payment, the United States would in theory receive some $6,845,000 per year, or $205,300,000 over the remaining 30-year life expectancy of these claims, absent commercial production.

The $5,000 per claim per year is a substitute for the $100 in the current law. We frankly see no rational basis for this increase of 50 times current law. It does not represent the present value of $100 in 1872. If a decision is made to increase the $100 in the current law, the amount must——

Senator WIRTH. The current law doesn't say $100. It says no less than $100.

Dr. DAVIS. No less than $100. Yes, that's correct.

Senator WIRTH. That is a significant difference.

Dr. DAVIS. Yes.

Senator WIRTH. The perception is in all the discussions that somehow everything is going up from what was a $100 fee when, in fact, the law says no less than $100. So, it could have been determined to be any amount.

Dr. DAVIS. Yes. Our position, Senator, is that the new amount should have some reasonable basis, and we do not feel that the $5,000 level is a reasonable basis. We do not object to that going up, but we think it should have some reasonable basis.

Finally, a contentious issue is raised in the requirement in H.R. 2392 that if the eight 1988 applications are to obtain an oil-shale and associated minerals patent, they must pay $2,000 per acre. Allegedly this is based on comparable sales. And I do not think that is a correct comparison. From one perspective, the Department ought to rush the oil-shale—only claims to patent at that price. Even if the fee for oil-shale properties went for $2,000 an acre, those past sales included the surface estate and other considerations which none of the claims in the eight applications will include. Under concessions made by those claimants, they do not get the surface. Therefore, that $2,000 amount we think should be rejected out of hand.

Thank you very much.

[The prepared statements of Dr. Davis and API follow:]

STATEMENT

OF

DR. JOHN A. DAVIS, JR.

Director
Exploration and Production Technology Center
Littleton, Colorado

Marathon Oil Company

ON

S.30 and H.R. 2392

BEFORE THE

Subcommittee on Mineral Resources

Development and Production

of the

Committee on Energy and Natural Resources

UNITED STATES SENATE

July 31, 1989

MY NAME IS JACK DAVIS. I AM THE DIRECTOR OF MARATHON OIL COMPANY'S EXPLORATION AND PRODUCTION TECHNOLOGY CENTER IN LITTLETON, COLORADO. I HAVE BEEN IN CHARGE OF MARATHON'S OIL SHALE ACTIVITIES IN COLORADO FOR THE PAST THREE YEARS, AND I HAVE BEEN ASSOCIATED WITH ITS RESEARCH, DEVELOPMENT, AND LAND ACQUISITION MATTERS FOR OVER 18 YEARS.

MY COMMENTS ARE DIRECTED PRIMARILY TO THE NECESSITY FOR LEGISLATION IN ORDER TO END THE DISPUTES OVER OIL SHALE CLAIMS WHICH HAVE BEEN GOING ON FOR OVER 70 YEARS. A CONGRESSIONALLY SANCTIONED COMPROMISE IS NEEDED TO SETTLE THE OIL SHALE PROBLEMS ONCE AND FOR ALL. THE COMMITTEE MUST CONSIDER AND PASS FAIR AND APPROPRIATE LEGISLATION THAT CAN BE SIGNED INTO LAW.

I URGE A COMPROMISE APPROACH TO EITHER S. 30 OR H.R. 2392 TO BRIDGE THE GULF BETWEEN THE VARIOUS COMPETING INTERESTS IN THE OIL SHALE ISSUES. TO ACCOMPLISH THIS OBJECTIVE, AND BASED UPON TESTIMONY FROM PARTIES YOU HAVE OR WILL HEAR FROM, I BELIEVE THERE ARE SEVERAL PRINCIPLES THAT CAN BE AGREED UPON AND THAT WILL ULTIMATELY RESULT IN THE DEVELOPMENT AND PRODUCTION OF SHALE OIL FROM THESE VAST RESOURCES.

FIRST. THERE ARE PENDING BEFORE THE DEPARTMENT OF THE INTERIOR SIX SENIOR OIL SHALE PATENT APPLICATIONS FILED WELL BEFORE THE 1986 PROCESSING MORATORIUM. MARATHON IS ONE OF THE SIX. MINERAL ENTRY FINAL CERTIFICATES HAVE BEEN ISSUED FOR THE CLAIMS COVERED BY FIVE OF THESE APPLICATIONS. THE CLAIMANTS' RIGHTS HAVE VESTED. IN 1987, CONGRESS PASSED A LAW WHICH RECOGNIZED THESE SPECIFIC APPLICATIONS AND AGREED AS A MATTER OF POLICY THAT THEY COULD BE PATENTED. THAT HAS NOT BUT SHOULD BE DONE BY THE DEPARTMENT FORTHWITH.

SECOND. FOR ALL OTHER OIL SHALE CLAIMS, INCLUDING CLAIMS COVERED BY EIGHT PATENT APPLICATIONS FILED IN MID-1988, A DIFFERENT PROBLEM EXISTS. AS WE UNDERSTAND THE MATTER, THOSE CLAIMANTS HAVE AGREED THAT THE OWNERSHIP OF THE SURFACE OF THOSE CLAIMS CAN REMAIN WITH THE UNITED STATES, SUBJECT TO REASONABLE USE FOR OIL SHALE DEVELOPMENT, AND THAT THEY ARE SEEKING THE OIL SHALE AND ASSOCIATED MINERALS ONLY. THIS IS A MAJOR CONCESSION BY THOSE CLAIMANTS. IF A MINERAL PATENT WERE ISSUED, IT WOULD COVER ONLY THE OIL SHALE SECTION OF THE GREEN RIVER FORMATION.

THIS COMPROMISE ACHIEVES CONGRESSIONAL OBJECTIVES WITH CLAIMANTS AND THE DEPARTMENT IN EFFORTS TO SETTLE SOME OF THE ISSUES AND TO MAKE THE SURFACE AVAILABLE FOR OTHER PUBLIC LAND USES AND THE OTHER MINERALS AVAILABLE FOR DEVELOPMENT.

THIRD. MANY OIL SHALE MINING CLAIMS ARE OUTSTANDING FOR WHICH PATENT APPLICATIONS HAVE NOT BEEN FILED. A PERIOD OF TIME SHOULD BE AFFORDED THOSE CLAIMANTS TO APPLY FOR AN PATENT AND AN OPPORTUNITY TO PROVE PATENTABILITY SHOULD THEY SO DESIRE. INDEED, WE BELIEVE THIS IS THEIR LEGAL RIGHT. CONGRESS HAS ESTABLISHED POLICY IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT AND IN THE FEDERAL LAND POLICY AND MANAGEMENT ACT TO PROVIDE NOTICE AND TIME IN WHICH A PATENT APPLICATION AND OTHER DOCUMENTS COULD BE FILED OR THE OPPORTUNITY AND THE CLAIM WOULD BE LOST. IN FAIRNESS, CONGRESS SHOULD FOLLOW THOSE PRECEDENTS TODAY. TO OUR KNOWLEDGE, CONGRESS HAS NEVER CUT OFF THE OPPORTUNITY TO APPLY FOR A PATENT IN THE MANNER SET OUT IN S. 30 OR H.R. 2392.

FOURTH. SOME DEFINITE SCHEDULE FOR FILING AND PROCESSING OIL SHALE PATENT APPLICATIONS SHOULD BE IMPOSED ON BOTH

APPLICANTS AND THE DEPARTMENT OF THE INTERIOR. BASED UPON OUR EXPERIENCE, WE KNOW THAT SELF-IMPOSED DELAY BY THE DEPARTMENT IN WORKING ON OIL SHALE PATENT APPLICATIONS IS THE ORDER OF THE DAY. EVEN WHERE AN APPLICANT HAS SUBMITTED FINAL PROOFS AND WHERE NO LEGISLATIVE MORATORIUM EXISTS ON PROCESSING, THE DEPARTMENT WILL NOT ACT. WE STRONGLY URGE THE COMMITTEE TO ADOPT PROVISIONS WHICH REQUIRE AN APPLICANT TO SUBMIT ALL FINAL PROOFS FOR A PATENT WITHIN A REASONABLE BUT SHORT PERIOD OF TIME AND THAT REQUIRES THE DEPARTMENT OF THE INTERIOR TO ACT ON THOSE PROOFS WITHIN AN EQUALLY SHORT BUT REASONABLE PERIOD OF TIME. OTHERWISE, THE PROBLEM OF PENDING APPLICATIONS AND UNPATENTED MINING CLAIMS MAY CONTINUE FOR ADDITIONAL DECADES. THERE IS HISTORIC CONGRESSIONAL PRECEDENT FOR THESE TYPES OF TIME OBLIGATIONS IN THE DISPOSAL OF PUBLIC LANDS.

THERE ARE SEVERAL SPECIFIC POINTS IN THE TWO BILLS THAT NEED TO BE ADDRESSED. BOTH S. 30 AND H.R. 2392 ARE FRAMED IN TERMS OF "ELECT OR FORFEIT." EACH BILL TAKES A SLIGHTLY DIFFERENT APPROACH TO A SEEMINGLY COMMON OBJECTIVE: FORCE THE ABANDONMENT

OF OIL SHALE CLAIM OWNERSHIP. THE ELECTION IN S. 30 FORCES THE OIL SHALE CLAIMANT:

1. TO TAKE A 20-YEAR LEASE WITH A ROYALTY OF NOT LESS THAN 12.5% ON RETORTED SHALE OIL (IF THE CLAIM IS FOUND VALID), WHICH MAY BE EXTENDED BY YEARLY COMMERCIAL PRODUCTION;

OR

2. TO MAINTAIN THE OIL SHALE CLAIM UNDER EXISTING LAW, EXCEPT THAT THE CLAIM SHALL BE DEEMED CONCLUSIVELY ABANDONED UNLESS THE CLAIMANT
   A. EXPENDS $1,000 PER CLAIM PER YEAR FOR LABOR OR IMPROVEMENTS, AND
   B. FILES ANNUALLY WITH THE DEPARTMENT VERIFIABLE PROOF OF EXPENDITURES, AND
   C. FOREGOES ALL OPPORTUNITY TO PARTICIPATE IN FUTURE OIL, GAS, OIL SHALE OR OTHER MINERAL DEVELOPMENT ON THE PUBLIC LANDS OF THE UNITED STATES.

S. 30 WILL AMEND THE 1920 MINERAL LEASING ACT TO DENY TO ANY HOLDER OF AN INTEREST IN AN OIL SHALE MINING CLAIM THE RIGHT TO OBTAIN A NEW FEDERAL LEASE FOR OIL, GAS, COAL, OIL SHALE, PHOSPHATES, POTASSIUM, SODIUM, OR THEIR COMPONENTS, IN ANY PUBLIC LANDS OF THE UNITED STATES.

SOME HOLDERS OF OIL SHALE CLAIMS ARE ALSO IN THE FEDERAL OIL AND GAS AND MINERALS EXPLORATION AND DEVELOPMENT BUSINESS. FOR THEM, THE PROHIBITION AND "ELECT-OR-FORFEIT" EDICT IS A "CATCH-22" SITUATION. THE ELECTION IS TO STAY IN OR GET OUT OF THE FEDERAL LEASABLE MINERALS BUSINESS. THIS HAS LITTLE RELATIONSHIP TO OIL SHALE DEVELOPMENT.

FOR H.R. 2392, THE ELECTION PROCESS CREATES A NON-VOLUNTARY CHOICE IN THAT:

1. THE OWNER MAY APPLY FOR A 20-YEAR LEASE TO OIL SHALE AND ASSOCIATED MINERALS WHICH MAY BE EXTENDED BY YEARLY COMMERCIAL PRODUCTION IF, WITHIN A TWO-YEAR EXAMINATION, THE CLAIM IS HELD VALID;

OR

2. THE OWNER MAY "MAINTAIN" THE CLAIM UNDER NEW REGULATORY REQUIREMENTS IN THE ABSENCE OF COMMERCIAL PRODUCTION OF OIL SHALE AND ASSOCIATED MINERALS THAT MANDATE AT LEAST $5,000 PER CLAIM PER YEAR OF ASSESSMENT WORK OR A PAYMENT OF THAT AMOUNT ANNUALLY TO THE SECRETARY, SUBJECT TO FORFEITURE 100 YEARS AFTER THE ORIGINAL LOCATION.

VIEWED IN THE MOST FAVORABLE LIGHT, THE OIL SHALE CLAIMANT IS GRANTED A NEW ESTATE FOR 30 YEARS (MOST CLAIMS WERE LOCATED IN 1917-1919) UPON PAYMENT OF $5,000 PER CLAIM PER YEAR ($150,000 TOTAL), SUBJECT TO DEFEASANCE AT ANY TIME. IF ALL CLAIMS WERE MAINTAINED BY PAYMENT, THE UNITED STATES WOULD IN THEORY RECEIVE SOME $6,845,000 PER YEAR, OR $205,300,000 OVER THE 30-YEAR LIFE EXPECTANCY OF THE CLAIM, ABSENT COMMERCIAL PRODUCTION.

THE $5,000 PER CLAIM PER YEAR IS A SUBSTITUTE FOR THE $100 IN CURRENT LAW. WE SEE NO RATIONAL BASIS FOR THIS INCREASE OF 50 TIMES CURRENT LAW. IT DOES NOT REPRESENT THE PRESENT VALUE OF $100 IN 1872. IF A DECISION IS MADE TO INCREASE THE $100 IN

CURRENT LAW, THE AMOUNT MUST HAVE A REASONABLE BASIS. IN ADDITION, REGULATIONS AS CONTEMPLATED IN H.R. 2392 HAVE NEVER BEEN NEEDED IN OIL SHALE MANAGEMENT.

FINALLY, A CONTENTIOUS ISSUE IS RAISED IN THE REQUIREMENT IN H.R. 2392 THAT IF THE EIGHT 1988 APPLICATIONS ARE TO OBTAIN AN OIL SHALE AND ASSOCIATED MINERALS PATENT, THEY MUST PAY $2,000 PER ACRE. ALLEGEDLY THIS IS BASED ON COMPARABLE SALES. THIS IS NOT A CORRECT COMPARISON. FROM ONE PERSPECTIVE, THE DEPARTMENT OUGHT TO RUSH THE OIL SHALE-ONLY CLAIMS TO PATENT AT THAT PRICE. EVEN IF FEE OIL SHALE PROPERTIES WENT FOR $2,000, THOSE PAST SALES INCLUDED THE SURFACE ESTATE AND OTHER CONSIDERATIONS WHICH NONE OF THE CLAIMS IN THE EIGHT APPLICATIONS WILL INCLUDE. UNDER CONCESSIONS MADE BY THOSE CLAIMANTS, THEY DO NOT GET THE SURFACE. THAT AMOUNT MUST BE REJECTED OUT OF HAND.

THANK YOU.

STATEMENT FOR HEARING RECORD
BY THE
AMERICAN PETROLEUM INSTITUTE
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
ON
S. 30
JULY 31, 1989

The American Petroleum Institute (API) is a national trade association with more than 200 member companies who are engaged in petroleum exploration, production, refining, transportation and marketing. Many of our members are actively involved in oil and gas exploration and production on federal lands. We thank you for the opportunity to submit comments for your consideration on Section 4 of S. 30.

API and its members support efforts to ensure the orderly, efficient and effective exploration and development of oil and gas resources on federal lands. For this reason, we must oppose section 4 of S. 30 which would prohibit holders of an oil shale mining patent under the 1872 Mining Law from obtaining a lease under the Mineral Leasing Act. In addition, the provision prohibits the Secretary of the Interior from approving assignments to a lease or leases to anyone who may be the holder of such oil shale patent.

Since the Mineral Leasing Act controls the leasing of oil and gas resources, as well as other minerals, the Section 4 prohibition could potentially affect companies' abilities to secure onshore oil and gas leases needed for continued energy exploration and production.

We fail to see any relationship between the activities of individuals operating under an 1872 Mining Law oil shale patent and the need to foreclose issuance of mineral leases under the Mineral Leasing Act. We urge the Committee to delete section 4 from S. 30 and to not include a similar provision in any other legislation.

Thank you for taking our comments into consideration.

Senator **Wirth**. Do you know where the $5,000 came from?

Dr. **Davis**. No, I do not.

Senator **Wirth**. It is interesting. These were not figures that were pulled out of the air. I know where the $1,000 came from. It was just the adjustment of no less than $100 adjusted for inflation. If that was the figure set in 1872, let's adjust it for inflation, and that seemed to be a reasonable amount. And that got us to $1,000.

The $5,000 figure came from the adjustment of workers' wages in 1872. If you took the variable of what workers' wages were in 1872 and adjusted them to 1989, that would go up more than just inflation itself. That is how the $5,000 figure was arrived at.

Dr. **Davis**. I was not aware of that.

Senator **Wirth**. They might appear to be nice, round figures out of the air, but where they came from was in trying to figure out what a reasonable adjustment would be from the 1872 figure of $100.

Dr. **Davis**. The $2,000 figure, as I understand it, came from sale prices that were mentioned earlier, but our concern there is that included surface rights. And we understand that those eight applications have been willing to forgo the surface rights. And therefore, we think that is an inappropriate figure.

Senator **Wirth**. I understand what you are saying. I think that is very constructive testimony as well, Dr. Davis. We are all, as you see, trying to sort this through. It has been very spongy as to what does one have to do to get patent to the land, what requirements have been there, what does the law say, what did the courts say in 1930, what did then the Interior Department say in 1960, what did the Hickel decision say in 1980 when we have had a whole lot of different interpretations, as you know, of the law. And that is what we are trying to sort through at this point.

There are no absolutes in this, as your testimony very clearly points out. If one assumed that there were absolutes in this, I think that we would not have a problem, as Senator Armstrong pointed out, but there are not any. It is a very tortuous and quite checkered history of very different interpretations, as you well understand.

And what we are trying to do is to get this thing settled once and for all. And the fact that you come in not only on behalf of Marathon, but representing I think or putting in the record at least the testimony of API is I think a helpful step in trying to get a sense that, yes, a compromise can and ought to be reached and let's get on with it and let's see if we can do that.

I think the separation as well—and most people have suggested—of the surface from mineral rights as your brother suggested this last year, Mr. Savage, is another point that we ought to be looking at and trying to sort out. I think that there is a major public interest in maintaining the openness of these lands. And you all agreed with that and so do we.

The question now is what happens to the mineral rights and which mineral rights fall in and that is what I think the issue is there and not any kind of an absolute item, but which of the mineral rights, whose mineral rights get grandfathered, whose mineral rights become private property, and which ones don't. That's ultimately where we are. And that is the nub of the remaining issue I think.

Maybe before going on, Mr. Alberswerth, I do not know if you or counsel might want to comment on anything that was said by the other two witnesses. Would either of you like to comment on anything that was said by the other witnesses?

Mr. **Alberswerth**. There is one issue that I would like to comment on that Mr. Savage brought up. This is apparently a point of grave disagreement between his perspective on the nature of those lands and ours, and that is that we consider those lands to be public domain lands, and they are not private lands until a patent issued. And that is when fee title vests. And until then they are public lands.

What the claimants have, in our understanding, is a right to develop and produce oil shale. And it is our understanding there has been no commercial development of oil shale on any of those claims for the past 70 years. That is why we are very concerned about the present and future status of those lands, and we would prefer for them to remain in public ownership.

What these bills provide is an opportunity to those claimants who in good faith have obtained those claims to develop oil shale to continue to do so. And we think that that is a fair compromise.

Senator **Wirth**. Do you believe, Mr. Alberswerth, that the Januman Campbell offered and the legislation that I offered as a more than generous compromise. Would you describe it as a more-than-generous compromise?

Mr. **Alberswerth**. We are describing it as a generous compromise, sir.

Senator Wirth. Do you believe, Mr. Alberswerth, that the January 1989 date that S. 30 was introduced—that that as a cutoff date for patent issuance is appropriate from a legal standpoint?

Mr. **Alberswerth**. I believe it is, but I would like to have Ms. Zimmerman address that issue, if you do not mind.

Ms. **Zimmerman**. I think the cutoff date is fine from a purely legal perspective. I think that these claimants have had more than an ample opportunity to exercise their rights under the 1872 Mining Law and the 1920 Mineral Leasing Act which grandfathered these claims. The right that they had was a right to mine for oil shale. They have had at least 70 years, if not more, to produce oil shale. The bills give them an opportunity to continue to mine for oil shale under some changed circumstances, but to continue to mine.

The surface patent under the 1872 mining law was always sort of a frill, and the fact that the bill required them to have met completely the patent applications prior to introduction in order to get that frill I think is completely constitutional and fair.

Senator **Wirth**. Well, Mr. Savage and his brother were conceding that, in fact, the surface rights were not the issue. Isn't that right?

Mr. **Savage**. I think our people, if we were talking about legislation that they could see would eventually deliver them the title to their oil shale minerals—I think most of these people would be willing to forgo title to their surface in that kind of environment. In the present legislative environment, I have been told in no uncertain terms that they will essentially fight to the last drop of blood for their entire property right as granted under the law. So, that is where we are today. Today they will not give up a thing.

Senator **Wirth**. Of course, there is a question as to what they have to give up. So, that is where we are.

Mr. **Savage**. Exactly, but that is the nature of the contest.

Senator **Wirth**. So, we're right back in the hornets' nest.

Mr. **Savage**. But that is what we want to avoid, Senator. As the claim holders, we would like to avoid another umpteen odd years of battling in the courts for this. And I think if we were looking at light at the end of the tunnel which was some equitable way for them to have title to their oil shale minerals, that as part of that compromise, they would be willing to give up their surface.

Senator **Wirth**. What is wrong with that, Mr. Alberswerth?

Mr. **Alberswerth**. Well, I think that principle basically is incorporated in both pieces of legislation, as I read them.

Senator **Wirth**. Where is the disagreement between you and Mr. Savage?

Mr. **Alberswerth**. I think the disagreement is that Mr. Savage—well, Mr. Savage can tell you better than I, but it sounds like what he would like to have is an absolute fee title to the oil-shale mineral. What your bill does is offer a lease and the opportunity to the right to develop that mineral. What Congressman Rahall and Campbell's bill does is provide two options: one option to purchase the oil-shale outright for $2,000 an acre, and the other option also to lease. So, it seems to me that that option is incorporated in an important fashion in both pieces of legislation.

Senator **Wirth**. And what is wrong with that, Mr. Savage?

Mr. **Savage**. Well, I told Orville he would only have to cough up $2.6 million, Senator, and he did not think that was such a great idea. Telling us that we can have our property for $2,000 an acre is the same thing as telling us we cannot have it at all because we cannot have it. We are not Exxon. We are just people. You raise the price a thousandfold and ask me what is wrong with that? We can't do it. It is the same thing as taking the property away.

If you want to apply some objective standard to the $2.50 an acre, maybe we cannot argue with that. I would still say that in equity you are bound by the terms of the original contract. We fulfilled our part of the bargain. Now let's have the Government fulfill theirs. If you want to raise it to some equitable reflection of what $2.50 means, which I believe is about a factor of 10, as in the case of assessment work, Orville and we would probably willing to pay $25 an acre for the transfer of title to the property. But $2,000 an acre? It is confiscatory.

Senator **Wirth**. Mr. Alberswerth.

Mr. **Alberswerth**. Well, the $2,000 an acre figure, of course, was derived from the sale of the oil-shale claims that were patented in the TOSCO settlement. So, that is the most recent information that we have I think about the value, the true fair market value, of those lands.

One of the directives or one of the policies that has been enunciated by Congress in law under the Federal Land Policy and Management Act is that the Federal Government, the public we serve, receive fair market value for goods and services derived from the public lands. So, we think that that is the most recent information we have regarding the value of those lands, and that is basically a fair price.

Senator WIRTH. It is my understanding that both Congressman Campbell's bill and mine says that you can maintain the property if you do a certain amount of assessment work on that property each year. Isn't that right?

Mr. SAVAGE. Is that that $5,000 a year, Senator?

Senator WIRTH. In my legislation—I believe it is $5,000 a year adjusted from the to at least $100 in 1972 terms in Congressman Campbell's bill. It is $1,000 in my bill, and $5,000 in Congressman Campbell's bill.

Now, the 1872 law says that you have to do at least $100 worth of improvements. Right?

Mr. SAVAGE. To protect ourselves from an adverse claimant, Senator, to keep someone from jumping your claim. Well, no one has been able to jump our oil shale claims since 1920. Only since 1976 has there been a requirement for annual work.

Senator WIRTH. Now, is it fair if the requirement was there in 1872 of at least $100, that that be adjusted to dollars in the late 20th century?

Mr. SAVAGE. Senator, you would be talking about adjusting the FLPMA requirement, not the 1872 requirement. Under the 1872 mining law, there is no requirement to do work year by year. You can walk away from your claims for years at a time. You always have the right to resume work. You can leave your claim for 10, 15 years at a time. If you return and pick up your shovel and go back to work and no one has jumped your claim in the interim, it is still your property. So, there is no need to do annual work except to protect yourself from adverse claimants.

If there are no adverse claimants—and my grandfather wrote to the Department of the Interior in the early 1920's asking whether or not we had to do annual assessment work any longer, and they very graciously replied, no, it is no longer necessary to do annual assessment work. There are no more adverse claimants. Do your $500 if you want to apply for a patent and apply.

Senator WIRTH. The 1872 mining law says as follows:

> On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year.

Isn't that pretty clear in the law as to what the law says that you have to do at least $100 worth of improvements every year?

Mr. SAVAGE. Or face forfeiture by an adverse claimant if one shows up. These claims have never been adversely claimed.

Senator WIRTH. It doesn't say anything about that. It says that not less than $100 worth of labor shall be performed or improvements made during each year——

Mr. SAVAGE. Well, Senator, what does the law say if you don't?

Senator WIRTH [continuing]. To maintain the claim. Isn't it fair to suggest that that $100 ought to be adjusted? A lot of people believe that $100—people have not maintained their claims over a period of time, as you know. That is one of the fundamental issues.

Mr. SAVAGE. I agree, Senator. There was some question the way the law was written as to what it meant. We inquired of the administrative department what they wanted us to do. They replied don't bother about annual assessment work, so we stopped doing it. Then later they held us accountable for having obeyed their directive. That is not fair.

Senator WIRTH. Hasn't there been a requirement that people who have claims have substantially comply with the law? Hasn't that existed some point along the line? Mr. Alberswerth, Ms. Zimmerman, you might want to address yourselves to that.

Ms. ZIMMERMAN. Yes. I would like to say that there is a requirement even for oil shale claimants that they have to have substantially complied with all law in order to receive a patent.

Senator WIRTH. Where does that requirement come from?

Ms. ZIMMERMAN. It comes from the court cases on the issue.

It is our understanding that the $100 assessment work is to be done each and every year. Now, there were some——

Senator WIRTH. I just read the law. I just read what the law says.

Ms. ZIMMERMAN. There were some conflicting recommendations made by the Department of the Interior between 1920 and 1960. The Department reversed itself I understand a number of times on whether or not these claimants had to do assessment work.

I do not think anyone is suggesting that people ought to be, in a sense, punished for following the recommendations of the Department of the Interior, but the question now is whether or not it would be fair to impose a requirement of assessment work higher than $100 a year. The law always said that that requirement could be higher than $100 a year. It says not less than. Raising that requirement from $100 a year to $1,000 a year or $5,000 a year we think is perfectly justifiable and the oil shale claimants now have to do $100 a year. It would be completely fair and equitable to require them to do $1,000.

Senator WIRTH. Well, tell me if any of you have other comments that you would like to make for the record. It seems to me this gets pretty circular after a while. One goes around and around and around. And one of the things that we are attempting to do is to break into the circle and see if we can get a reasonable resolution of this issue.

I thought that the suggestions made by our witness from the State of Colorado, Mr. Cattany, were pretty reasonable. Did you have any reaction to those, Mr. Savage? You were here during that.

Mr. SAVAGE. Those recommendations, with difference in some particulars, very closely parallelled the straw bill we had built in the compromise committee in Colorado over the course of about a year. One particular set of parties declined to endorse that position of the compromise group. Therefore, there was no consensus. It was a consensus committee.

Senator WIRTH. Who did that?

Mr. SAVAGE. That was the National Wildlife Federation and the Sierra Club.

Senator WIRTH. And are you familiar with that, Mr. Alberswerth?

Mr. ALBERSWERTH. I am somewhat familiar with it. I was not personally involved in it.

Senator WIRTH. Ms. Zimmerman, are you familiar with that? What Mr. Savage is suggesting was that there was pretty close to a compromise presided over by Mr. Cattany, as I understand it. I do not want to speak for you. I will just try to summarize and correct me if I am wrong. They were very close to reaching a compromise. All the parties except the Sierra Club and the National Wildlife Federation had signed up to the compromise. Is that right?

Mr. SAVAGE. Yes, nothing formal, but we had reached——

Senator WIRTH. Nothing formal, but that is your understanding of what transpired. Are you familiar with that, Dr. Davis?

Dr. DAVIS. Yes. I attended one of those meetings and one of my employees attended all of those sessions. We were an active participant in that proceeding.

Senator WIRTH. What were the problems with the Wildlife Federation and the Sierra Club? I should let the Wildlife Federation speak for itself.

Ms. ZIMMERMAN. One of the problems was this continuing window of opportunity. We had a great deal of problem with the idea of leaving the window open sort of in perpetuity for people to continue to patent oil shale claims. We think that there has to be a resolution to this issue, that there has to be sort of a deadline.

Senator WIRTH. What is your answer to that, Mr. Savage?

Mr. SAVAGE. Absolutely. We want to resolve the issue too, Senator.

Senator WIRTH. You want to shut the window of opportunity, too. Now, how might the two of you get together how you shut the window of opportunity? We shut the window of vulnerability very soon after the 1988 elections. Why can't we shut the window of opportunity? [Laughter.]

Mr. ALBERSWERTH. Again, this is circular, but the two bills before us do that, and I think the dispute was over how long shall we continue in the future to leave that window open for people to come in and apply for patents. And our view has been that that window of opportunity has been open for 70 years now.

Senator WIRTH. Mr. Savage wants to shut the window. Ms. Zimmerman says that the Wildlife Federation wanted to shut the window. And now we both agree to what we want to get done. The question is how to do it. Is that right?

Mr. ALBERSWERTH. I think it is when to shut the window.

Senator WIRTH. When would you all like to shut the window?

Mr. ALBERSWERTH. Well, as of the date of introduction of this legislation.

Mr. SAVAGE. Obviously, Senator, it is no window if it is in the past. You can't fly through it if it is behind you. We have to have some opportunity for the people in western Colorado to say yes.

Senator WIRTH. But they know this has been going on for some long time. We have been debating this issue for a long, long time. It is not as though people are out there saying, hey, nothing is happening here. What is a fair window of opportunity?

Mr. SAVAGE. People could get their patent applications in in as little as 6 months. The problem is it is a very expensive process. We managed to do our own internally. Most people cannot do that. They have to go to an attorney, pay an attorney, do title searches, et cetera.

Senator WIRTH. They can come to you and get your help, couldn't they?

Mr. SAVAGE. Well, I am not in the business, Senator.

It is an expensive process and it is a risk. And a lot of people did not want to take that gamble. You are talking $12,000, $25,000 out of pocket.

Senator WIRTH. And if they didn't take the gamble, then they would just—from your perspective, say, if we set a window of opportunity of 6 months and people didn't want to do it, they would be out of luck at the end of that 6-month period of time. Is that fair?

Mr. SAVAGE. At least they would have had a chance.

Senator WIRTH. What is wrong with that, Ms. Zimmerman?

Ms. ZIMMERMAN. Well, quite frankly, we are worried about the fact that people who had never intended to patent their claims may now rush to patent them in the next 6 months.

Senator WIRTH. But if they haven't done the assessment, they cannot comply. Isn't that right? I mean, why if they never intended to do, if they haven't met—OK, let's leave aside. We have sort of narrowed the differences on shutting the window. All right?

What are the other problems that the Wildlife Federation had with the Cattany compromise?

Ms. ZIMMERMAN. It was also my understanding the negotiations broke down over a number of things. The window of opportunity was one of them. It also broke down over a question of what the determination of validity was going to consist of. It also broke down over the fact that although the claimants were willing to shift to a leasing system in some cases, if we were going to shift—if we were going to have this election for a lease system, they also wanted to continue the patenting election.

Senator WIRTH. If we put you and Mr. Savage and Mr. Cattany in a room for the next 2 hours, how long would it take you to resolve the problem?

Ms. ZIMMERMAN. It took us several months to get as close as we did.

Senator WIRTH. It sounds to me like you are pretty close. We have the window of opportunity. We are 6 months away from closing the window. Right?

Now, what are the other problems that exist with this? The lease question, right?

Ms. ZIMMERMAN. There were problems with the lease question. There is a problem over what the validity test was going to be.

Senator WIRTH. The validity test. You mean what was evidence of improving the claims. Is that what you mean by the validity test?

Ms. ZIMMERMAN. Right.

Mr. SAVAGE. No, Senator. She means the standard of discovery, don't you?

Ms. ZIMMERMAN. Also the standards for assessment work, whether or not assessment was going to be required on an annual basis. One of the disputes in this case has always been Judge Finesilver's determination in the TOSCO case that all the claimant had to do was $500 of assessment work over 70 years and that was it. They had no requirement to do assessment work after that. We do not think that is true.

Mr. **Savage**. As long as our right to resume work, which you also find in the 1872 mining law, is recognized, Senator, we have no problem with any assessment work standard. We have resumed work since FLPMA on all of the claims and have done our annual work every year since.

Now, if you want to pass some kind of law that contravenes our right to resume work, we cannot agree to that. We have the right to go back to our claims and pick up our shovels again and demonstrate our interest in the claim. And if we can do that, we do not have any problem with any assessment standard they care to——

Senator **Wirth**. As long as the Department didn't contest you in the meantime.

Mr. **Savage**. There were some Department contests, but all of them have since been invalidated by the Department's own internal administrative actions. There were no valid contests in the interim before the resumption of work. There were contests in the 1930's when the claims were declared invalid, and those contests have since been invalidated by the Department's own internal regulations.

Senator **Wirth**. Is that right?

Ms. **Zimmerman**. I have no idea whether or not the prior contests are invalid at this point, but if they failed to do their $100 worth of assessment work this year, the Department has a right to contest their claim.

Senator **Wirth**. If we were to extend the window beyond January 30, 1989, say, in S. 30, the legislation I have offered, if we were to extend it beyond that for a 6-month period of time, then what problems would you have with the legislation, Mr. Savage?

Mr. **Savage**. I'm sorry, Senator. Do you mean 6 months beyond January? Do you mean last June?

Senator **Wirth**. Six months beyond the date of enactment.

Mr. **Savage**. We are still operative in the past. I cannot go back to DeBeque and tell George Anderson to put his patent application in last June.

Senator **Wirth**. No, after date of enactment of the legislation.

Mr. **Savage**. You mean a date in the future.

Senator **Wirth**. Yes. We enact the legislation September 1, 1989, and you say, OK, you guys have till the first of January or the first of March 1990.

Mr. **Savage**. We do not have any problem with that, Senator.

Senator **Wirth**. So, if the legislation were prolonged with a bigger window, it would be okay with you.

Mr. **Savage**. A window in front of us rather than a window behind us.

Senator **Wirth**. That is what I'm saying.

Mr. **Savage**. Yes, Senator, that would be fine with us.

Senator **Wirth**. So, S. 30 and the provisions in S. 30 would then—you would be satisfied.

Mr. **Savage**. No, Senator. You are still telling me that for the patent applications I have filed I am still going to have to pay $2,000 an acre to get title to my property. That's the same as telling me you can't have your property.

Senator WIRTH. That's not the case in S. 30.

Mr. SAVAGE. Oh, I'm sorry, Senator. I am having a hard time keeping the legislation straight.

Senator WIRTH. We attempted to look at this. I understand your window issue. There is not that kind of a requirement in S. 30 now. We can go back and review that.

Why don't you do this? If in fact what you are most concerned about is that other people who claim that they have been doing all the work on the land and have been in this for one generation after another would be unfairly treated by an earlier date, if there were a later date—say, we established a date of January 1, 1990—maybe you could go back and let us know then what other problems exist with the legislation, not the House legislation. We are on the Senate side right now, and we have to sort this thing through.

Dr. Davis offered a variety of options on this. I think it would generally—you know, if you think we are heading in the right direction in terms of the compromise that we have offered, generous as it is been described by the Wilderness Federation.

Mr. SAVAGE. Senator, under your bill would I be able to patent my claims and get title to my oil shale minerals?

Senator WIRTH. Let me have you talk to counsel. Ask your question again.

Mr. SAVAGE. We own oil shale claims. We have applied for a patent. Under your bill would we get title to our oil shale minerals under your bill.

Senator WIRTH. Why don't we just have you and counsel go back and forth to make sure that we are getting the right items on the record here. OK?

Ms. VEHMAS. I am not sure of the current status of your claim, where you are in the process.

Mr. SAVAGE. We are in the category 2 claims.

Ms. VEHMAS. The first half has not issued, the first half of the final certificate has not issued.

Mr. SAVAGE. No. The Department of the Interior has done nothing. We have filed the application. The Department has our application. It is pending.

Ms. VEHMAS. Under S. 30 as it currently is written, you would not receive title. However, under a window of opportunity—it depends on how it is structured. Under a larger prospective window of opportunity, if the claim were found to be valid and if you are fully complying by the date, as I understand the conversation today, I would think so, but I do not want to commit on it until having taken a look at it further.

Mr. WHITE. Senator, if I may have just one short comment. The problem is with the "all requirements" phrase. Does "all requirements" for a patent mean all the statutory requirements as the case law and some commentators say, or does it mean in addition to the administrative requirements?

A window or a period of time in the future for those who have not filed is fine. The question is can you let those people proceed then and rather than take away from the Secretary his obligation to adjudicate those patents, require that he does adjudicate each and every one of them through whatever has to be done so that they get up to and through the final certificate, the clear listing, the mineral examination and so forth.

You have about 15 patent applications there that are in different stages of processing. Some have had final certificates for a number of years. In Marathon's case, we are close. Some of them, as Mr. Savage said, haven't gotten anywhere.

Those patent applications mean something. Those people have some rights under them, and the case law and other indications are that the Secretary has a ministerial, nondiscretionary obligation to proceed with those. That has been taken away. I think that is the thing that ought to be addressed in the legislation. Let those go forward.

Senator WIRTH. How do we avoid under that the fraudulent—we heard earlier 40 percent of the 500 that were honored previously were fraudulent.

Mr. WHITE. If fraud is involved, I would suggest you immediately write to the Department of Justice or the U.S. attorney in Colorado and bring that to their attention. There is a statute that provides that these patents can be cancelled if fraud is involved. If it is simply the allegation that you do not like what the Secretary did, that is something else.

On the one hand, we are complaining to the——

Senator WIRTH. But the 200 out of 500 very clearly did not meet the criteria established by the Secretary. I understand that that is what was suggested earlier, but that he provided it anyway.

Mr. WHITE. Maybe yea and maybe nay. Fraud may be easy to allege, but I think it is difficult to prove. I would suspect that probably there is more to it than that.

To get back to the point I was trying to make, on the one hand, we are complaining to the Secretary that he is not doing what the law requires him to do. On the other hand, Congress and others are complaining that he is trying to do what the law requires him to do. There ought to be some middle ground that could take care of that.

Senator WIRTH. Dr. Davis.

Dr. DAVIS. I would just like to make one statement. I know there is a lot of concern about surface ownership and the fact that by issuing some of these patents, that that would fall into use totally nonrelated to mining applications. In Marathon's case, we already own more than half of the surface rights to the claims that we have filed upon. We own that in fee.

And long before this issue came up, we had signed a long-term lease with the Division of Wildlife in Colorado to make those lands available for public use along with adjacent fee lands.

So, I think while there is a lot of concern, you and I, Senator, know that that is really not the best condo building acreage in Colorado. We are very interested in seeing the long-term development of oil shale. We have committed a lot of dollars to it over the years, and we are mindful of the public interest in maintaining hunting rights and other things on that land as long as there is not active mining going on. And we have taken steps several years ago to make a lease with DNR in Colorado to make those available.

Senator WIRTH. I appreciate that. I think we all do. And I had suggested earlier that a lot of that land had been shut down. Some of it has. Others have not. And we appreciate the work of those who have not done so for the purposes of people who have lived in the area for a long time who for three generations have probably been hunting on that land as well.

I am not sure how much we are going to resolve right here. It seems to me that as suggested by Dr. Davis and perhaps by Mr. Cattany in getting close to a compromise with some questions that are left in terms of the window of opportunity, we are looking at the potential of a piece of legislation to resolve this issue that separates out the surface rights and the mineral rights, leaves this for oil shale only, not oil and gas, that has reclamation and bonding requirements, and that perhaps there is another way of looking at the royalty issue on this as a way of adjusting the fee schedule so that it doesn't become so onerous.

What remains the problem is one that has been there for a long time I would think and that is how do you determine who has met these requirements over a long period of time. And the law says at least $100. The Department of the Interior said in 1920 maybe you do not have to do $100 a year. The court said maybe you do not have to do $100 year. Then there was a court decision in 1980 that said, yes, you do have to do that. And we have had a whole lot of different interpretations as to what had to be done in terms of improving the land.

And that is the final kind of sticking issue in all of this. That is the one that we keep coming back to. I think that is the one that Senator Armstrong is referring to. If people have legally improved the land in the way the law said they had to, then they get title to the land. Well, that's fine. But the question is have they done that or have they not done that. And I think there are a lot of allegations, and the 40 percent is a suggestion at least 40 percent of the people hadn't done that. And that is the final problem that we face. I think that is the toughest one right here. I do not know if you all agree with that, but that would appear to be the remaining issue.

If we can figure out an equitable way for determining that or having some kind of an appeal on that front so if people have been out there for three generations, Mr. Savage, and have done everything the law said that they should do, they get the mineral rights. But if they are coming in fly by night and speculating on the land, as I suspect a lot of people have been doing—and you probably agree with me that there have been a number of people doing that—that the taxpayers should not be subsidizing their speculation.

Mr. SAVAGE. Usually the speculators wait until you get patent, as a matter of fact, Senator. We got patent to some of the land you were talking about in the compromise that was the result of the Finesilver decision. Twenty-five hundred acres of that, as a matter of fact, belongs to my family. And we told Shell to go take a long walk off a short pier. We weren't selling our oil shale land to anybody whose avowed purpose was to sit and hold it as part of their strategic reserve. My grandfather and my father devoted their lives to the development of oil shale. And we are interested in somebody who will show up and turn this resource into an industry. And we had to forgo $5 million because of what we believe in. Now, I think that disqualifies us from the speculators' club.

Senator WIRTH. I was saying that there are a number of people. I was not suggesting, Mr. Savage, that your grandfather was a speculator. I'm sure he was a very prudent and thoughtful oil shaler.

In any case, I thank you all very much for being here.

We will leave the record open both for other statements that individuals might have—Senator Armstrong had a full statement that he wanted to include in the record—plus if there are items that any of you on the basis of the discussion today would like to add for the record, clarifications for the record or suggestions for the record, or if any of you see your way through the Gordian knots that surround the Cattany compromise, we will leave the record open for that as well. We will leave it until till the end of the week.

Thank you all very much for being here. We appreciate your coming and spending time with us.

The subcommittee will be adjourned.

[Whereupon, at 11:12 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

United States Department of the Interior
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 20 1989

Honorable Jeff Bingaman
Chairman, Subcommittee on Mineral Resources
  Development and Production
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of July 31, 1989, in which you submitted questions as a follow-up to the July 31, 1989, hearing before the Subcommittee on Mineral Resources Development and Production, Committee on Energy and Natural Resources, on S. 30 and H.R. 2392, bills concerning oil shale mining claims.

We are pleased to enclose responses to the questions submitted to us.

Thank you for the opportunity to provide this material for inclusion in the official hearing record.

Sincerely,

/s/ James M. Hughes

Assistant Secretary, Land and
Minerals Management

Enclosure

: Secy's File (MIB 6013), Secy's RF(2)(MIB 6013), LM(MIB 6628),
  LC(MIB 6246), 1680 (MIB 3539)
  140-Leg(MIB 5555), 140-Chron, 140-RF
LLM:BLM:140:FWatson:vgv:8/14/89:343-8735:ID0099W: Control #11378
680: Bob Gibson (Enclosures)
Revised per SOL: 9/14/89

QUESTIONS FROM SENATOR JEFF BINGAMAN

Question 1. **Eleven of the pending patent applications have not had the first half of the final certificate issued. Please provide the status of each of these eleven applications.**

- What steps have been completed toward the issuance of the first half of the final certificate?

  Response. The first half of the final certificate was issued for Exxon's oil shale patent C-38579 on June 15, 1989. The Colorado State Office is responsible for seven of the remaining ten patent applications. The other two pending patent applications are in Utah.

  The status of the seven applications in Colorado is as follows:

  Six patent applications are pending under serial numbers COC-48471, COC-48472, COC-48544, COC-48545, COC-48944, and COC-48968. The claimants have filed documents necessary for issuing the first half of the final certificate. The applications have not been adjudicated and payment for the claims has not been requested. The claimants, however, have proceeded to publish at their own risk after consulting with the mineral adjudication staff.

  An application for patent has been filed under serial number COC-48558. This application has only received cursory review.

  The status of the two patent applications in Utah is as follows:

  Larson's original application filed March 1988
  Amended application filed June 1989

  Cliff Synfuels original application filed March 1989
  Amended application filed June 1989

As of August 11, 1989, only the initial adjudication of the applications has been performed.

Note: Frederick Larson's application for mineral patent was converted from 1 application into 11 separate applications giving Utah a total of 12 oil shale patent applications.

There are only 10 pending patent applications. In June 1984, the Colorado State Office dismissed with prejudice the application for patent for four claims previously declared null and void under serial number C-38402. The Colorado State Office decision was appealed to the Interior Board of Land Appeals ((IBLA). The IBLA affirmed the Colorado State Office decision on June 3, 1987, under Union Oil Company of California, 98 IBLA 37 (1987). To date, the claimant (Union Oil Company) has not filed an appeal in Federal court. Therefore, no final certification will be issued for patent application C-38402.

- **What steps have not been completed and why?**

  Response. For the group of six patent applications that have documents filed, BLM still must determine whether all regulatory requirements have been met, including all required documents. If the applications are complete, then the payments for the claims will be requested and the first half of the final certificates will issue for these applications.

  Our cursory review for patent application COC-48558 indicates that this application is very complex and will require a significant amount of time to adjudicate. The application covers 64 claims for 10,240 acres. It appears that the claims do not conform to the latest cadastral survey. The claimant will therefore have to amend his location certificates or initiate a separate mineral survey. In addition, several required documents are missing from the application.

  Utah is presently preparing to publish out rival claimants and forward applications to the District Office for preliminary field work in preparation for validity examination once the Department publishes standards. The delay in processing the Utah oil shale patent applications was due to extensive amendments by the applicant.

Question 2. **Has an affidavit of annual assessment work been filed every year since 1979 for the 1,600 existing oil shale mining claims?**

- If not, please list those claims for which no affidavit of assessment work has been filed, and the year or years that such affidavit has not been filed.

  Response. All claimants have filed Affidavits of Labor since 1979 for existing oil shale mining claims.

QUESTIONS FROM SENATOR TIMOTHY E. WIRTH

1. Please provide a list of the oil shale claims patented under the TOSCO Settlement that had previously been contested by the Department or any other party, the grounds on which the validity of these claims were contested and the grounds for the validity determination.

In summarizing the contest history of the claims in the Settlement Agreement, it would be appropriate to divide the history into two periods.

The 1930's contests were generally contests based on failure to do assessment work for at least one year. These contest are denoted by the five-digit numbers.

The second period, beginning in the late 1960's, involved the application of the Hickel v. The Oil Shale Corp. (400 U.S. 48 (1970)) decision remand on cases pending at that time regarding the need to perform substantial compliance with the assessment work requirements of the 1872 Act and, concurrently, the need to apply the physical finding of a valuable deposit of oil shale ruling of the Andrus v. Shell Oil Co. (446 U.S. 657 (1980)) decision. These contests from the 1960's, 1970's and 1980's are denoted by the three-digit numbers. Many different charges were brought in these contest actions. A number of these charges were dropped during the hearing proceedings and the Interior Board of Land Appeals procedurally dismissed several other charges. The Board, utilizing the "physical finding of a valuable deposit" ruling of the Andrus v. Shell Oil Co. decision, validated the discovery on many claims of exposures of the Parachute Creek member. This decision apparently validated no claims on discovery of a tongue of the Parachute Creek member that merged with the Parachute Creek member within the boundary of the claim. The decision also invalidated those without such discoveries plus some nonmineral 10-acre subdivisions and then proceeded, with a few exceptions (i.e., the Northwest and Southwest claims of the U.S. v. Bohme, et al., 87 ID 535 decision), to declare all the claims null and void for failure to substantially perform assessment work.

Mining claims and contest numbers are in the left column, summaries of the contest changes are in the right column.

CLAIM NAME & CONTEST NUMBERS	CONTEST CHARGE(s)
The Bohme Claims	
Carbon Nos. 1-5 Elizabeth Nos. 1-2, 4-12 #12029 - 7/30/30	Failure to perform assessment.
#659	No discovery on or before Mineral Leasing Act (2/25/20); no existing discovery of valuable mineral deposit; claims declared null & void on 8/25/31, excluding Carbon No. 5; claims abandoned; failure to perform annual assessment work; no physical location of claims on ground.
Compass Claims - Northwest, Northeast, Southeast, Southwest #12972 - 12/23/31	Failure to perform assessment 1931.
#658	No discovery on or before Mineral Leasing Act (2/25/20); no existing discovery of valuable mineral deposit; part of lands nonmineral in character; Northwest, Northeast, & Southeast Placer claims declared null & void on 12/23/31; failure to perform annual assessment work.

Oyler Nos. 1-4 #12039 - 12/2/31	Assessment not done each and every year since 2/25/20.
#660	No discovery of valuable mineral deposit on or before 12/6/16; lands within Naval Oil Shale Reserve No. 1, Colorado No. 1; valuable mineral deposit does not exist on claims; claims declared null & void on 12/2/31 (affirmed by Sec. of the Interior); failure to perform annual assessment work.

The Weber Claims

Sunset Nos. 1-31 #12128 - 5/9/30	Failure to perform assessment 1921-29.
#193	No discovery on or before Mineral Leasing Act (2/25/20); no discovery of valuable mineral deposit prior to 9/22/61; lands nonmineral in character; claims abandoned, not existing claims.
Liberty Bell Nos. 1-12 #11758 - 7/21/31	Failure to perform assessment 1929.
#260	No physical location of claims on ground; claims fraudulently located; no discovery on or before Mineral Leasing Act (2/25/20); no current discovery of valuable mineral deposit; lands nonmineral in character; claims abandoned, not existing claims.
Tom Boy Nos. 1-12 #11760 - 7/3/31 & 11/3/31	Failure to perform assessment 1930.
#260	No physical location of claims on ground; claims fraudulently located; no discovery on or before Mineral Leasing Act (2/25/20); no current discovery of valuable mineral deposit; lands nonmineral in character; claims abandoned, not existing claims.

Bute No. 20	
#11757 - 7/3/31	Failure to perform assessment 1921-27.
#260	No physical location of claims on ground; claims fraudulently located; no discovery on or before Mineral Leasing Act (2/25/20); no current discovery of valuable mineral deposit; lands nonmineral in character; claims abandoned, not existing claims.
Bute No. 29	
#11757 - 7/3/31	Failure to perform assessment 1921-27.
#260	No physical location of claims on ground; claims fraudulently located; no discovery on or before Mineral Leasing Act (2/25/20); no current discovery of valuable mineral deposit; lands nonmineral in character; claims abandoned, not existing claims.
Atlas Nos. 4-6, 8, 11, 13-16	
#11759 - 7/13/31	Failure to perform assessment 1930.
#260	No physical location of claims on ground; claims fraudulently located; no discovery on or before Mineral Leasing Act (2/25/20); no current discovery of valuable mineral deposit; lands nonmineral in character; claims abandoned, not existing claims.
Atlas No. 10	
#11759 - 7/13/31	Failure to perform assessment 1930.
#725	Claim previously abandoned; failure to substantially comply with 30 U.S.C. 28; no discovery of oil shale deposit within limits of claim on or before Mineral Leasing Act (2/25/20); no present discovery within limits of claims; claim invalid, not located in conformance with law.

Hoffman No. 20	
#12588 - 10/15/31	Failure to perform assessment 1930.
#685	No discovery on or before Mineral Leasing Act (2/25/20); patent previously issued to conflicting claim(s); no physical location of claim on ground; failure to perform annual assessment work; claim abandoned by 12/11/59; interest invalid in Hoffman No. 20.
Hoffman No. 46	
#12596 - 9/17/31	Failure to perform assessment 1930.
#685	No discovery on or before Mineral Leasing Act (2/25/20); patent previously issued to conflicting claim(s); no physical location of claim on ground; failure to perform annual assessment work; claim abandoned by 12/11/59; interest invalid in Hoffman No. 46.
Greeley Nos. 1-6, 8	
#12272 (Greeley No. 3)	Failure to perform assessment 1929.
#12273 (Greeley No. 4)	Failure to perform assessment 1929.
#12276 (Greeley Nos. 5, 6)	Failure to perform assessment 1929.
#12277 (Greeley Nos. 2, 8)	Failure to perform assessment 1929.
#12278 (Greeley No.1)	Failure to perform assessment 1929.
All dated 6/21/30 & 7/8/31	
#686	No discovery on or before Mineral Leasing Act (2/25/20); no valuable mineral deposit; lands nonmineral in character; no physical location of claim on ground; failure to perform annual assessment work; claims abandoned by 8/28/57; no location prior to Mineral Leasing Act; fraudulent location of claims; interest invalid in Greeley Nos. 1,3,4.
Jack Pot Nos. 1-11	
#13038 - 10/27/32	Failure to perform assessment 1931.
#687	No discovery on or before Mineral Leasing Act (2/25/20); no valuable mineral deposit; failure to perform annual assessment work; interest invalid in Jackpot Nos. 4-11.

Betty Nos. 1-4, 7-8, Louise Nos. 1-6, Grace Nos.1-8, Patricia Nos. 1-8, Lucy Agnes 1-2, Edna Nos. 1-4 and Madge Nos. 5, 7-8	
#12574 - 9/21/31 (Betty, Grace, Louise and Edna Claims)	
#12717 - 9/22/31 & 6/24/32 (Madge & Patricia Claims)	Failure to perform assessment 1929.
#11750 - 10/8/28 (Lucy Agnes Claims)	Failure to perform assessment 1921-27.
#12372 - 8/18/30 (Lucy Agnes Claims)	
#688	No discovery on or before Mineral Leasing Act (2/25/20); no valuable mineral deposit; no physical location of claims on ground; failure to perform annual assessment work; claims abandoned by 1/6/54; interest invalid in Betty Nos. 1 to 8, Grace Nos. 1 to 8, Edna Nos. 1 to 8, Louise Nos. 1 to 6, and Gold Bug Nos. 1 to 4.
Hazel Nos. 1-8, Fay Nos. 1-8, Florence Nos. 1-8, Gold Bug Nos. 1-4 Mary Ann Nos. 1-40, Edna Nos. 5-8 and Madge Nos. 1-4	
#11848 - 8/6/30 (Fay, Florence, and Hazel Claims)	
#11925 - 8/24/31 (Gold Bug Claims)	
#12165 - 5/15/30 (Mary Ann Claims)	
#12574 - 9/21/31 (Edna Claims)	
#12717 - 9/22/31 & 6/24/32 (Madge Claims)	Failure to perform assessment 1929.
#688	No discovery on or before Mineral Leasing Act (2/25/20); no valuable mineral deposit; no physical location of claims on ground; failure to perform annual assessment work; claims abandoned by 1/6/54; interest invalid in Betty Nos. 1 to 8, Grace Nos. 1 to 8, Edna Nos. 1 to 8, Louise Nos. 1 to 6, and Gold Bug Nos. 1 to 4.

Energy Resources Claims

Mullins Nos. 13-20	
#11988 - 7/2/31	Failure to perform assessment 1929.
#699	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.
Denver Nos. 2, 3, 5-12 and Emma Nos. 3, 4	
#12064 and #12069 - 9/5/30 (Denver Claims)	Failure to perform assessment 1929.
#12074 - 9/5/30 & 8/1/31 (Emma Claims)	Failure to perform assessment 1929.
#698	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.
Hydrocarbon Nos. 2-14, Denver Nos. 1, 4, and Brush Creek Coils Nos. 2, 3	
#12031 - 6/30/31 & 8/1/31 (Hydrocarbon No. 2)	Failure to perform assessment 1929.
#12073 - 9/5/30 & 7/29/31 (Hydrocarbon Nos. 3-14)	Failure to perform assessment 1929.
#12064 and #12069 - 9/5/30 (Denver Nos. 1, 4)	Failure to perform assessment 1929.
#12072 - 9/5/30 & 7/21/31 (Brush Creek Coils Nos. 2,3)	Failure to perform assessment 1929.
#697	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.

Kent, Hydrocarbon No. 1, Pollak Nos. 1-4, and Emma No. 5	
#12064 - 9/5/30 (Kent)	Failure to perform assessment 1929.
#12031 - 6/30/31 & 8/1/31 (Hydrocarbon No. 1);	Failure to perform assessment 1929.
#12076 - 9/5/30 & 7/21/31 (Pollak Nos. 1-4);	Failure to perform assessment 1929.
#12074 - 9/5/30 & 8/1/31 (Emma No. 1)	Failure to perform assessment 1929.
#696	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.
Bute Nos. 1-19, 21-28, and 30-32	
#11757 - 5/4/28, 7/3/31, and 11/3/31	Failure to perform assessment 1929.
#695	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.
Bute Nos. 33-48	
#11757 - 5/4/28, 7/3/31, and 11/3/31	Failure to perform assessment 1929.
#694	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to substantially comply with 30 USC 28; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.

Ohio Nos. 1-50	
#12790 - 10/3/31	Failure to perform assessment 1930.
#692	No discovery on or before Mineral Leasing Act (2/25/20); failure to perform annual assessment work; claims previously abandoned, declared void.
Atlas Nos. 12, 17, 18 and Camp Bird Nos. 1-20	
#11759 - 5/4/28 & 10/8/31 (Atlas Nos. 12, 17, 18)	Failure to perform assessment 1921-27.
#11761 - 5/4/28 & 10/20/31 (Camp Bird Nos. 1-20)	Failure to perform assessment 1930.
#690	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.
Atlas Nos. 1-3, 7, 9	
#11759 - 5/4/28 & 10/8/31	Failure to perform assessment 1921-27.
#689	No discovery on or before Mineral Leasing Act (2/25/20); no present discovery of valuable mineral deposit; failure to perform annual assessment work; claims previously abandoned, declared void; claims not properly located or held prior to Mineral Leasing Act.

Theo Ertl Claims

Pueblo Nos. 1-6, 8, 16	
#11739 - 2/3/28 (Pueblo Nos. 1-4)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#11736 - 2/8/28 (Pueblo Nos. 5-6)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#704	Claims previously abandoned; failure to perform annual assessment work; no discovery to support locations prior to Mineral Leasing Act.

Pueblo Nos. 29-36	
#11739 - 2/3/28 (Pueblo Nos. 29-31)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#11736 - 2/8/28 (Pueblo Nos. 32-36)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#11737 - 10/8/31 (Pueblo No. 32)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#705	Claims previously abandoned; failure to perform annual assessment work; no discovery to support locations prior to Mineral Leasing Act; no present discovery on Pueblo No. 34; excess acreage held in Pueblo No. 31.
Pueblo Nos. 15, 17-22	
#11739 - 2/3/28 (Pueblo Nos. 15, 17, 18)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#11736 - 2/8/28 (Pueblo Nos. 19-22)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#706	Claims previously abandoned; failure to perform annual assessment work; no discovery to support locations prior to Mineral Leasing Act; no present discovery on Pueblo No. 21.
Pueblo Nos. 9-14	
#11736 - 2/8/28 (Pueblo Nos. 9-14)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#11737 - 10/8/31 (Pueblo No. 12)	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#707	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery within limits of each claim.

Cedar Nos. 1-8 and Helen Agnes Nos. 1-8 #11747 - 5/8/28	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#708	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery for Cedar Nos. 1,3-8, Helen Agnes Nos. 1-8; Cedar No. 4 & Helen Agnes No. 6 excess acres per locator.
Cathedral Nos. 17-27 #12428 - 7/16/31	Failure to perform assessment 1929.
#709	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery within limits of each claim.
W&W Nos. 7-12, 25-28, and 40-43 #11901 - 10/2/28	Not valid on date of Mineral Leasing Act (2/25/20); Failure to perform assessment 1921-26.
#710	Failure to substantially comply with 30 USC 28; claims abandoned; no discovery to support locations prior to Mineral Leasing Act; no present discovery within limits of W&W Nos. 7,28,40,41,42.
Pueblo Nos. 23-26 #11736 - 2/8/28	Not valid on date of Mineral Leasing Act (2/25/20); Failure to perform assessment 1921-26.
#711	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery within limits of Pueblo Nos. 25,26.

W&W Nos. 32-39	
#11901 - 10/2/1928	Failure to perform assessment 1921-26.
#712	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery within limits of each claim; W&W No. 32 contains more than 160 acres, invalid as to excess acreage.
Ruth Nos. 29-32	
#11601 - 10/22/1927	Failure to perform assessment 1921-26.
#713	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery within limits of Ruth No. 32.
Ruth Nos. 9-20 and G.J. Nos. 1-4	
#11899 - 10/2/1928 (Ruth Nos. 9-14)	Failure to perform assessment 1921-26.
#11601 - 10/22/19 (Ruth Nos. 15-16, G.J. Nos. 1-4)	Failure to perform assessment 1921-26.
#1840 (Ruth Nos. 17-20)	Failure to perform assessment 1921-26.
#11600 - 10/10/1 (Ruth Nos. 17-20)	Failure to perform assessment 1921-26.
#11648 - 6/23/1931 (Ruth Nos. 17-20)	Failure to perform assessment 1930.
#714	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery within limits of Ruth Nos. 9, 16-19; parts of G.J. Nos. 1-4 nonmineral in character; Ruth No. 9 contains excess acreage.

Ruth Nos. 25-28 #11601 - 10/22/1927	Failure to perform assessment 1921-26.
#715	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; parts of Ruth No. 25 nonmineral in character.
Ruth Nos. 6-8 and G.J. No. 5 #11900 - 10/6/1928	Failure to perform assessment 1921-26.
#716	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; Ruth No. 8 contains excess acreage; parts of G.J. No. 5, Ruth No. 6,7 nonmineral in character.
Ruth Nos. 21-24	
#1840 (Ruth Nos. 21-22)	Failure to perform assessment 1921-26.
#11600 - 10/10/1927 (Ruth Nos. 21-22)	Failure to perform assessment 1921-26.
#11648 - 6/23/1931 (Ruth Nos. 21-22)	Failure to perform assessment 1930.
#11899 - 10/6/1928 (Ruth Nos. 23-24)	Failure to perform assessment 1921-26.
#717	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery in Ruth No. 24; Ruth No. 24 contains excess acreage.
Nancy Nos. 1-8 #11747 - 5/8/1928	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#718	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery in Nancy Nos. 1-4.

Pueblo Nos. 27, 28, 37-44 #11736 - 5/8/1928	Not valid on date of Mineral Leasing Act (2/25/20); failure to perform assessment 1921-26.
#719	Claims previously abandoned; failure to substantially comply with 30 USC 28; no discovery of oil shale deposit to support locations prior to Mineral Leasing Act; no present discovery in Pueblo Nos. 37-44; Pueblo No. 37 contains excess acreage; Pueblo No. 40 contains excess acres per locato.

2. By letter of December 7, 1988, the Department stated its intention at that point to process pending applications to oil shale claims. The letter detailed the discovery standard to be used, stating that it was "consistent with the statutes as interpreted by the U.S. Supreme Court".

o Please provide the specific Supreme Court rulings on which the Department relied.

The Oil Placer Act of 1897 amended the Mining Law of 1872 to state that lands chiefly valuable for "mineral oils" were locatable as placer mining claims. The Mineral Leasing Act of 1920 discontinued oil shale as a locatable mineral, but grandfathered prior claims, allowing patenting.

When the Secretary decided Freeman v. Summers in 1927, nearly 70,000 acres of claims in Utah, Colorado and Wyoming had been patented despite the lack of commercial production. The Freeman case firmly established that "prospectively valuable" rich beds of oil shale were sufficient for patenting, and that these beds need not be exposed if leaner beds exposed on a claim lead to the reasonable geologic inference that the richer beds are beneath. The Department used this standard of discovery for oil shale for 40 years thereafter.

In 1964, the Department contested several oil shale claims under patent application alleging that no discovery of a valuable mineral presently existed within the claims on the basis of an evaluation of mining costs versus anticipated shale oil recovery and price, applying the "prudent man" test. The Freeman discovery standard was overturned by the IBLA as an improper standard, holding that the speculative value of oil shale was insufficient to vest rights under the Mining Law. But, the Supreme Court decided in Andrus v. Shell Oil (1980) that Freeman was the correct interpretation of the discovery standard.

- **If an exposure of oil shale yields 15 gallons of shale oil per ton of rock, what price per barrel of oil would be needed to make shale oil commercially producible from such shale.**

The standard of discovery for oil shale placer mining claims as set out in Andrus v. Shell Oil (1980) is a "prospective valuable" standard, as opposed to the other commodities covered by the mining law. Because of this, the Department has not found it necessary to inquire into such cost/value information. There are currently no shale oil extraction technologies that have progressed from bench test or pilot test technology through to commercial technology. As such, there is no reliable input and output cost data upon which to base an estimate of the minimum price necessary for a barrel of shale oil to be profitable. Until a potential—commercial technology is available, the estimation of commercial costs is not possible. Thus, the Department has no information on which to base an estimate.

- **The standard states that "the inferred connection of the qualifying marlstone tongue need not occur within the confines of the mining claim." What geologic evidence would be required to ensure that the valuable beds of oil shale occur within the boundaries of the mining claim.**

Briefly the components of the Department's proposed standard are:

A physical exposure of minerals, satisfied by either:

a) An exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim yielding 15 gallons or more of shale oil per ton of rock, in beds not less than 1 foot thick, yielding 1,500 barrels or more per acre, or

b) An exposure of a marlstone tongue of the Green River Formation, yielding not less than 3 gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the uppermost strata of prospectively valuable rich beds of oil shale lying at depth within the boundaries of the mining claim, but the inferred connection of the qualifying marlstone tongue need not occur within the confines of the mining claim.

Rocks meeting the assay required in a) above are deemed to be prospectively valuable rich beds of oil shale sufficient to satisfy the test of discovery under the Mining Law, without regard to the lack of commercial success in developing oil shale deposits to date. Their presence assures a determination that a discovery is present.

In all cases under b) above, the geologic evidence to support the reasonable inference of the existence of the prospectively rich beds would be determined in the field and would be based on the professional judgement of a qualified mineral examiner. This would require the field gathering of geologic information sufficient to permit the projection of the prospectively valuable rich bed into the boundaries of the oil shale mining claim.

3. How does the Department ensure that the oil shale mining claims were properly located pursuant to the Mining Law of 1872?

Every oil shale mineral patent application is sent to the Regional Solicitor for a title opinion. During that review the office has the opportunity to examine the title documents for evidence of fraudulent location. The examining attorney must carefully weigh the evidence for fraud, if any exists, with the likelihood of success in pursuing allegations in the administrative process. In the case of oil shale mineral patent applications as many as 70 years may have passed since the acts of locations and recordation took place, making the pursuit of fraud allegations difficult, if not impossible.

4. How much does the validity examination of a claim cost the Department or other government agencies?

A typical validity examination for a 160 acre placer mining claim will cost as follows:

Mineral Examination:

1. Field time (mapping, sampling, claim boundary identification) will be 1 week for two examiners. Cost =$1400.
2. Laboratory costs (assays and bench testing). Cost=$4,000.
3. Office time (Report writing, literature search, computation of oil shale oil reserves, geologic analysis). Cost for two examiners will be one month = $5600.

Adjudication:

1. One land law examiner (LLE) for two weeks (title search, identification of all owners for legal service, preparation of mineral contest complaint). Cost = $1400.

Total estimated cost per placer claim = $12,400.

Multiple claims contained in a contigous block will have an economy of scale reduction in "unit costs". On a hypothetic block of 80 claims (12,800 acres) the field costs will increase in linear fashion but laboratory and office costs will increase at a lower rate. Field costs will be: $112,200, laboratory costs (20% discount for volume work) : $60,000, office time (2 months) : $11,200, adjudication time (one month) : $4,800; total estimated cost: $187,400.

5. How much does patent processing for any one claim cost the Department or other government agencies?

A typical cost for patenting a 160 acre placer mining claim is as follows:

Mineral Examination:
1. Field time (mapping, sampling, claim boundary identification) will be 1 week for two examiners. Cost =$1400.
2. Laboratory costs (assays and bench testing). Cost=$4,000.
3. Office time (Report writing, literature search, computation of oil shale oil reserves, geologic analysis). Cost for two examiners will be one month = $5600.

Adjudication:
1. One land law examiner (LLE) for four weeks (title verification, publication [legal notice of intent to patent], processing of final proofs and statements, preparation of final certificate, preparation of patent). Cost = $2800.

Total estimated costs: $ 13,800.

Multiple claims contained in a contigous block will have an economy of scale reduction in "unit costs". On a hypothetic block of 80 claims (12,800 acres) the field costs will increase in linear fashion but laboratory and office costs will increase at a lower rate. Field costs will be: $112,200, laboratory costs (20% discount for volume work) : $60,000, office time (2 months) : $11,200, adjudication time (one month) : $4,800; total estimated cost: $187,400.

6. Does the Department recover any of the costs referred to in the previous questions (4, 5) from claimants or patentees?

In 1988, as the result of prompting from the Comptroller General and the Congress, the Bureau concluded that certain fees were necessary to put the mining law administration program on a cost recovery basis. The fees, which became effective on January 3, 1989, do not recover all of the costs associated which the Bureau has concluded result from a citizen locating maintaining and operating a mining claim, because the applicable laws do not permit 100 percent cost recovery. The fees collected under the rules include an increase in mining claim recordation costs, as well as new fees for annual filings, transfers of interest and amendments to locations. Fees for petitions for deferment of assessment work were increased. Additionally, the Bureau now collect a service charge of $250 per application filed and the first claim contained therein, with an additional service charge of $50 for each additional claim contained within the application.

7. What does it cost the Department to formally invalidate a claim found not to meet the proper standards? Please include the costs of appeals and other adjudication.

Mineral Examination:

1. Field time (mapping, sampling, claim boundary identification) will be 1 week for two examiners.
Cost =$1400.
2. Laboratory costs (assays and bench testing).
Cost=$4,000.
3. Office time (Report writing, literature search, computation of oil shale oil reserves, geologic analysis).
Cost for two examiners will be one month = $5600.
4. One week preparing for the mineral contest hearing before an Administrative Law Judge in the Hearings Division (review field work, update mineral report as to marketability of oil shale, geologic review, title documents, case file review for any points being related to claim's validity). [The mineral examiner is the Government's expert witness in a contest action and will have to establish the prima facie case of invalidity of the mining claim.]
Cost = $700.

Adjudication:

1. One land law examiner (LLE) for two weeks (title search, identification of all owners for legal service, preparation of mineral contest complaint). Cost = $1400.

Solicitor:

1. One attorney for one week from the Solicitor's Office to prepare the case for a hearing before an Administrative Law Judge in the Hearings Division. Cost = $1200.

2. Post hearing briefs and responses. One week's time.
Cost = $1200.
3. Appeals to the Interior Board of Land Appeals (IBLA). One week's time preparing briefs and argument for submission to the Board. Cost = $1200.

Office of Hearings and Appeals:

1. Administrative Law Judge presiding over the hearing and writing the decision on the case. (Hearing is usually two days, research of case law and writing of the decision usually two weeks). Cost = $3,000.
2. Interior Board of Land Appeals review of appeal (Three judge panel per case, lead judge time = two weeks research and writing of draft opinion, three days review time by the other two judges, final opinion writing). Cost = $4,000.

Federal Court Appeal under the Administrative Procedures Act.

1. Appeal of the Department's (IBLA) finding of non-validity and declaration of the claim being deemed null and void. It is difficult to estimate these costs, as each case will be unique on its merits. However, the Department's Office of the Solicitor will be involved in preparation of the case. The Department of Justice (DOJ) will have one or two attorneys on the case. The DOJ will argue the case in Court. If appeals are filed, then the case will go to the Circuit Court of Appeals, and possibly to the Supreme Court.

Estimated costs of contesting a placer mining claim, exclusive of the Federal Court process is $ 23,700.

Multiple claims contained in a contigous block will have an economy of scale reduction in "unit costs". On a hypothetic block of 80 claims (12,800 acres) the field costs will increase in linear fashion but laboratory and office costs will increase at a lower rate. Field costs will be: $112,200, laboratory costs (20% discount for volume work) : $60,000, office Time (2 months) : $11,200, adjudication time (one month) : $4,800, mineral examiners preparation time (two weeks) : $1400, Solicitor's time (two weeks) : $2,400, ALJ's time (4 days hearing, two weeks write up) : $3500, IBLA review as above: $4,000;

Total estimated cost: $199,500.

8. Are any costs recovered from the invalidation of a claim?

No law allows the Government to charge someone the costs associated with defending their mining claims. In most cases, also, the claimant (the contestee) cannot recover attorney fees and costs either, if they were to prevail in the contest and win.

Contest actions of the Department are governed both by the Administrative Procures Act (5 USC 554 et seq. [1982]) and the Secretary's plenary authority to settle all rights and interests in the public lands under 43 USC 2, 1201, and 1457 [1982].

9. Please provide the Subcommittee with copies of the draft legislative proposal you referred to in your testimony, a copy of the draft regulations that Secretary Lujan is reviewing, along with any changes suggested since the regulations were returned from OMB.

As requested, attached is an oil shale legislative proposal that has been under review within the Department. As a result of its review of oil shale issues however, the Administration no longer considers this draft legislation as the active alternative.

- **How many of the outstanding oil shale claims would likely be found to be valid under the draft regulations submitted to OMB? Under any proposed changes?**

In April 1987, a Bureau of Land Management Task Force evaluated the discovery standards to be applied to oil shale mining claims, including a standard similar to the one adopted into the draft regulations. Based on a desktop estimate, without field examination, the Task Force concluded that:

85% of claims in Colorado
75% of claims in Utah, and
45% of claims in Wyoming,

would be found to have satisfied the discovery standard. We stress that this estimate is a preliminary one and must be confirmed in the field by a qualified mineral examiner. At this time, there are no changes to the attached rules; therefore, these figures remain unchanged.

A BILL

To provide for the expeditious and equitable resolution of oil shale mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the "Oil Shale Lands Act of 1989".

SEC. 2. Definitions. As used in this Act:

(a) The term "oil shale mining claim" means an oil placer mining claim located under the mining laws prior to February 25, 1920, for oil shale, which has not been adjudicated.

(b) The term "valid oil shale mining claim" means an oil placer mining claim which was located and on which a discovery was made under the mining laws prior to February 25, 1920, for oil shale, which has been maintained in accordance with section 37 of the Act of February 25, 1920 (30 U.S.C. 193), including compliance with section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

(c) The term "claimant" means any person or other entity who owns all or part of the legal title to an oil shale mining claim and who has recorded this ownership interest with the Bureau of Land Management under section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

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SEC. 3. Filing Notice of Applications for Patent.

(a) Time Limit for Filing Notice for Patent Application. Within 1 year from the date of enactment of this Act, a claimant shall file with the Secretary of the Interior for each oil shale mining claim either a notice of intent to file an application for patent or an application for patent.

(b) Failure to File. Failure to file a notice or application as required by subsection (a) of this section shall be deemed conclusively to constitute an abandonment of the entire mining claim by operation of law.

(c) Pending Applications. The requirement of subsection (a) of this section does not apply to an oil shale mining claim for which a patent application is pending with the Department of the Interior on the date of enactment of this Act.

(d) Other Requirements. The provisions of subsection (a) of this section shall be in addition to the requirements of section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

SEC. 4. Filing of Applications for Patent.

(a) Filing Requirement. An application for patent shall be filed within 3 years of the enactment of this Act for every oil shale mining claim for which a notice of intent to file an application for patent was filed with the Secretary in accordance with section 3(a) of this Act.

(b) Failure to File. Failure to file a patent application as provided in subsection (a) of this section for any oil shale mining claim, valid or otherwise, shall be deemed conclusively to constitute an abandonment of the mining claim by operation of law.

SEC. 5. Requirements to Qualify for a Patent. In order to establish the validity of a mining claim pursuant to this Act, a mining claimant shall comply with all requirements in law, regulations, or judicial and administrative decisions relating to qualifications for the issuance of a patent, including but not limited to, clear chain of title to the claim, location of the claim on lands open to mineral entry at the time of location and compliance with all other requirements for good faith location of a mining claim and in addition shall establish that:

(1) There has been a discovery of a valuable oil shale deposit, within the meaning of the mining laws. For the purposes of this subsection, the prospectively valuable rich beds of the Green River Formation are those yielding 15 gallons or more per ton of rock in beds not less than 1 foot thick, yielding 1,500 barrels of oil per acre. A discovery is shown to exist by either of the following:

(A) an exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim, or

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(B) an exposure of a marlstone tongue of the Green River Formation, measuring not less than 3 gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the prospectively valuable rich beds. The rich bed must lie within the boundaries of the mining claim, but the inferred connection of the qualifying tongue of oil shale need not occur within the confines of the mining claim.

(2) There has been substantial compliance with the assessment work requirements of the mining laws, including the minimum annual expenditure of labor and means in an effort to develop a valuable oil shale deposit, without a lapse of two or more years duration unless such lapse was authorized by act of Congress, or there has been resumption of such assessment work after a lapse of two or more years but before initiation of a contest of the oil shale mining claim: Provided, that for any lapse of assessment work after the date of enactment of this Act the resumption of labor prior to the initiation of a contest shall not be a defense against a contest brought on this basis.

SEC. 6. Oil Shale Patents.

(a) Patents. A patent issued by the Secretary of the Interior after the date of enactment of this Act for a valid oil shale mining claim shall convey title only to the oil shale and associated minerals. Title to the surface and

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to all other minerals including, but not limited to, oil, gas, and coal shall remain in the United States. Section 120(h) of the Comprehensive Environmental Response Compensation and Liability Act, as amended, (42 U.S.C. 9620) shall not apply to this section.

(b) Surface Use. Oil shale patents issued pursuant to this Act shall also grant the right to use so much of the surface within the confines of the former claim as is reasonably necessary for the exploration, mining, and processing of the oil shale and associated minerals subject to the following conditions:

The right of surface use for exploration, mining and processing of oil shale is subject only to the filing with the Secretary of the Interior for public lands, or the Secretary of Agriculture for lands within the National Forest System reserved from the public domain, of a notice and submission of a bond in an amount sufficient to ensure adequate reclamation of the lands to be disturbed by any aspect of the proposed mining and processing operations. However, under no circumstances shall any liability under the Resource Conservation and Recovery Act, as amended, (42 U.S.C. 6901 et seq.) or the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (42 U.S.C. 9601 et seq.) resulting from such surface use accrue to the United States, either during or after exploration, mining, processing, and reclamation.

(c) Notwithstanding any other provision of law, patents shall be issued pursuant to this Act only after payment to the United States of $25 per acre for the acreage included in the former mining claim.

SEC. 7. Rules and Regulations, Etc.

The Secretary of the Interior may promulgate such rules and regulations and take all actions he deems necessary and proper to carry out the purposes of this Act.

SEC. 8. Notice.

Within 60 days after the enactment of this Act the Secretary of the Interior shall send a written notification, setting out the provisions and requirements of this Act, to all owners identified in the documents required for recordation of mining claims under section 314 of the Federal Land Policy and Management Act of 1976.

SEC. 9. Exceptions.

The provisions of section 6 do not apply to those oil shale mining claims contained within patent applications numbered C-35080, C-36293, C-38579, C-39464, C-41836, and C-43354.

SEC. 10. **Severability.**

If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.

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4310-84

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

AA-680-08-4310

43 CFR PARTS 3840 AND 3850

NATURE AND CLASSES OF MINING CLAIMS AND ASSESSMENT WORK

Amendments Affecting Petroleum Placer Claims, Particularly Oil Shale Claims

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AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed Rulemaking

SUMMARY: The BLM proposes to amend 43 CFR Parts 3840 and 3850 (oil shale mining claims) to clarify what is meant by the phrase "discovery of a valuable oil shale deposit" within the meaning of the savings clause of the Mineral Leasing Act (30 U.S.C. 193), and to clarify the meaning of the phrase "substantial compliance with assessment work" as required by the Mining Law (30 U.S.C. 28) for all mining claims.

DATE: Comments should be submitted by ____________________________, 1988. Comments received or postmarked after the above date may not be considered as part of the decisionmaking process on issuance of a final rulemaking.

ADDRESS: Comments should be sent to:

Director (140)
Bureau of Land Management
Room 5555, Main Interior Bldg.
1800 C Street, N.W.
Washington, D.C. 20240

Comments will be available for public review in Room 5555 of the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

William Condit
(202) 343-8537

SUPPLEMENTARY INFORMATION: This proposed rulemaking would revise the existing regulations on oil shale mining claims, to set out the showing needed to satisfy the discovery test in order to qualify as a valid existing claim under the savings clause of the Mineral Leasing Act, as amended and supplemented (30 U.S.C. 193), and also to clarify the meaning of substantial compliance with assessment work as required by the Mining Law (30 U.S.C. 28) for all mining claims.

A recent order of the U.S. Court of Appeals for the Tenth Circuit (discussed below) has vacated as moot several precedents with respect to what is meant by the phrase "discovery of a valuable oil shale deposit" within the meaning of the mining laws. This proposed rulemaking would establish for the first time in regulatory form the definition of a discovery of a valuable oil shale deposit. If adopted as a final rulemaking, this provision would be applicable to the approximately 1,600 remaining unpatented oil shale placer claims.

The proposed changes in the provisions covering assessment work requirements are designed to clarify the conditions under which the United States can contest a mining claim for a claimant's failure to fulfill the assessment work requirements. An important element of the amendment is the establishment and

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inclusion in the regulation of the principle of resumption. Under the provisions of the revised regulation, the United States would be precluded from initiating a contest against a mining claim after the claimant has resumed labor on the claim, without regard to the length of the period of the failure to meet the annual obligation for labor on the claim.

Background

Prior to 1920, oil shale was a locatable mineral subject to the Mining Law of 1872. In 1920, the Mineral Leasing Act made oil shale a leasable mineral but "grandfathered" existing oil shale mining claims so that valid oil shale claims that were maintained in compliance with the Mining Law of 1872 could be patented under that law (30 U.S.C. 193).

Since the change in the law in 1920 and, therefore, in the status of oil shale, the issue of what actions are required by oil shale mining claimants in order to maintain their claims and go to patent has been the subject of many judicial and administrative decision. Some of the decisions have been conflicting. There is no clear, unequivocal interpretation of the law to serve as a guide to the claimant and the Federal administrator to assure that all remaining claims are handled consistently and equitably, with due recognition of those legal rights which may have enured to the claimants in addition to protection of the public interests.

The case history involving oil shale claims indicates that litigation has generally involved two areas: discovery and assessment work.

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Discovery

The discovery of a valuable deposit of minerals is the most fundamental aspect of the mining law. Without discovery, there is no vesting of rights in the land.

As stated above, prior to 1920, lands principally valuable for oil shale were open to location and patent in the same manner as oil and gas placer mining claims. In the case of Freeman v. Summers, 52 L.D. 201 (1927), the Department of the Interior ruled that the prospective value of oil shale was sufficient to engender this brief despite the fact that no profitable distillation of oil shale had been demonstrated in the Piceance Basin of Colorado to date. Furthermore, the decision found that the "lean" oil shale exposed within the claim was sufficient exposure of minerals to meet the discovery test, because geologic inference reasonably led to the belief that "richer" oil shale occurred at depth.

In 1930 and 1931, Congressional committees examined the patenting of oil shale mining claims by the Department of the Interior. The Senate Committee on Public Lands focused almost exclusively on the Freeman v. Summers standards.

Upon concluding hearings, the Committee Chairman advised the Department to complete disposition of the pending applications for oil shale lands in conformity with the law. This congressional acquiescence in the Department's actions in patenting oil shale anchored case law and Departmental practice from 1930 to 1961. During that time, the Freeman v. Summers discovery standard was routinely applied and 523 patents for 2,326 claims covering 349,088 acres were issued.

In the mid-1960's, the Government reexamined this policy and began to impose a more restrictive discovery standard placing emphasis on the lack of profitability in producing shale oil, that is, requiring a showing of the likelihood that a claim could be operated with a reasonable prospect of success as a commercial venture. Therefore, the DOI began to contest oil shale claims under patent application, alleging no discovery of a valuable mineral deposit had been made. In 1974, the Interior Board of Land Appeals (IBLA) overruled the discovery standard of Freeman v. Summers in the case U.S. v. Winegar (81 I.D 370), placing great emphasis on the lack of profitability. In 1980, this more restrictive standard was rejected by the Supreme Court in the case of Andrus v. Shell Oil Co., 446 U.S. 657 (1980), holding that the Freeman discovery standard is the correct interpretation of the savings clause of the Mineral Leasing Act, that it had received congressional ratification, and that the Department of the Interior could not invalidate claims on the grounds that oil shale had no present commercial value.

Assessment Work

The obligation to perform assessment work is the other major issue associated with the management of oil shale mining claims since the passage of the Mineral Leasing Act. The savings clause of that Act required oil shale mining claims to be maintained in accordance with the mining laws (30 U.S.C. 193).

Under the mining laws, to hold a claim, a claimant must, among other things, perform at least $100 worth of assessment per claim each year (30 U.S.C. 28). The purpose of this provision is to encourage diligent development of the claim. Failure to perform this labor allows relocation of the claim by rival claimants, unless labor is resumed first (30 U.S.C. 28). This qualification is called the resumption principle and serves to bar adverse actions against the claim.

In the 1920's and early 1930's, the Department of the Interior contested a number of oil shale mining claims for failure to perform annual assessment work. These administrative contest efforts led to two Supreme Court decisions adverse to the Department: *Wilbur v. Krushnic*, 280 U.S. 306 (1930); and *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935). In both decisions, the Supreme Court held that the claimant's right under 30 U.S.C. 28 to resume assessment work was preserved by the savings clause of the Mineral Leasing Act. In *Wilbur*, the court specifically held that the Government was barred from contesting a mining claim for failure to perform annual assessment work as long as the claimant resumed performance prior to the contest. In *Ickes*, however, the court suggested that the Government had no authority at all to contest a mining claim for failure to perform annual assessment work. In *Ickes*, the alleged lapse of work had lasted for just one year. Accordingly the Department of the Interior, in the *The Shale Oil Company*, 55 L.D. 287 (1935), reversed its decisions invalidating oil shale claims for failure to perform assessment work. From 1935 to the early 1960's, the Department issued patents to approximately 350,000 acres of land for oil shale claims, without regard to whether annual assessment work was done, continuing to use the *Freeman v. Summers* precedent to verify the discovery of a valuable oil shale deposit.

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In the early 1960's, the Department changed its policy regarding assessment work requirements. It began rejecting patent applications for oil shale claims that it deemed invalued for failure to perform assessment work based on pre-1935 contests. Claimants whose patent applications were rejected on this ground brought suit. In 1966, the Federal District Court for Colorado ruled that the Department lacked authority to contest the claims for lack of assessment work and that the pre-1935 contests based on that allegation were void for that reason. This was affirmed on appeal in 1969. In 1970, the Supreme Court in Hickel v. TOSCO, 400 U.S. 48 (1970), reversed the decision, holding that the Department of the Interior could contest claims where a claimant failed to "substantially comply" with the assessment work requirement. The Supreme Court, however, did not define the term "substantial compliance" nor did it indicate any guidelines for developing a definition. Instead, the Supreme Court remanded the case to the District Court to allow the applicants "to bring their claims within the narrow ambit of Krushnic and Virginia-Colorado, as [the Supreme Court has] construed and limited these opinions".

In 1972, the Department provided constructive notice alerting all mining claimants that their claims were subject to cancellation for failure to substantially comply with annual assessment requirements (43 CFR 3851.3[a]). Since 1972, the Department has been in a better position to contest claims because of nonperformance of annual assessment work, subject to the constraint of the resumption principle.

Since 1979, Section 314 of the Federal Land Policy and Management Act (FLPMA) has required every mining claimant to file annually either an affidavit of assessment or a notice of intent to hold the claim. The Department accepts the statement in the affidavits of assessment work unless compelling evidence to the contrary is presented.

Affidavits of assessment work have been filed with the Bureau of Land Management in 1979, and thereafter, for all but 108 oil shale claims. Filing pursuant to FLPMA of a notice of intent to hold a mining claim does not create a presumption of performance of labor. To the contrary, the filing of a notice of intent to hold a mining claim strongly implies that there has not been substantial compliance with the obligation to annually perform labor, or make improvements, valued at not less than $100 per claim.

The TOSCO v. Hodel Decisions

The litigation commonly referred to as the "TOSCO" case resulted from consolidation of thirteen separate lawsuits filed after the Department rejected 41 oil shale patent applications in the 1960's. The TOSCO case was the test case on the meaning of "maintenance" of a claim that is required by the Savings Clause of the Mineral Leasing Act. Following a 1976 remand by the U.S. Court of Appeals for the Tenth Circuit for consideration of all issues, the Department filed new contests against the mining claims. Each contest alleged lack of discovery and failure to substantially comply with assessment work requirements. These contests resulted in four decision is by the Interior Board of Land Appeals and one by the Director, Office of Hearings and

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Appeals. The decisions held that the mining claims were invalid because they had not substantially complied with the assessment work requirement, or because they contained no exposure of oil shale which was of sufficient quality to support a discovery. In the TOSCO v. Hodel decision of May 1, 1985, the U.S. District Court for the District of Colorado reversed the holdings of the Board of Land Appeals. Among other things, the Court held, that (1) exposure of a surface outcrop of oil shale from the Green River Formation supported an inference of sufficient oil shale at depth to support a discovery; (2) the Department was barred from raising failure to perform assessment work because the claimant had resumed the work; and (3) the claimants had substantially complied with the annual assessment work requirement because a cumulative total $500 worth of labor had been performed on each claim, which is all that is necessary to patent.

Most of the elements of a valid mining claim - proper location, recordation, discovery of a valuable mineral deposit, and maintenance - have been defined in case law over the last century. However, oil shale mining claims are unique with respect to the discovery standard, and in regard to the Government's inquiry into assessment work performance. The Tenth Circuit Court of Appeals recently vacated the District Court decision of TOSCO v. Hodel because the issues are moot, and ordered the District Court to vacate the decisions of the Interior Department which led to TOSCO. Thus, the recent administrative and judicial case law defining the standards upon which these two elements of validity of oil shale mining claims are to be measured is no longer controlling precedent.

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Proposed rule - Discovery

The proposed rulemaking would establish the standard of discovery necessary to demonstrate that a valuable oil shale deposit, within the meaning of the mining laws, occurs within the claim. The standard stems from an analysis of the options available to the Department of the Interior in administratively determining oil shale mining claim validity. The decision in *Andrus v. Shell Oil* recognizes that the 1927 Secretarial decision in *Freeman v. Summers* is the correct interpretation of discovery requirements for oil shale. The standard recognizes exposures of the rich beds of the Green River Formation as having sufficient prospective value to qualify as a discovery. The prospectively valuable oil shale standard adopted by the U.S. Geological Survey in 1916, (beds at least 1 foot thick yielding at least 15 gallons of shale oil per ton of rock, yielding at least 1,500 barrels of oil per acre) is established as the standard in the proposed rulemaking.

This standard may be met by the Parachute Creek Member in the Piceance and Uinta basins of Colorado and Utah, respectively. In the oil shale basins of Wyoming, the geologic nomenclature differs from the locale of the *Freeman* claims. In the Green River basin, claims containing exposures of the rich beds of the Laney and Wilkins Peak Members were patented in the past, but in the Fossil Basin no oil shale patents have been issued although the Fossil Butte Member reportedly contains some rich beds of oil shale.

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The standard of discovery can also be met through exposure of marlstone tongues of the Green River Formation, containing a least three gallons of shale oil per ton of rock, that can be reasonably inferred to connect to the prospectively valuable rich beds defined above. Such is the case in the vicinity of the oil shale claims at issue in Freeman v. Summers which were deemed to contain a discovery of a valuable mineral deposit sufficient to patent the claims.

Substantial Compliance with Assessment Work Requirements

The proposed rulemaking would further clarify the criteria for substantial compliance with assessment work requirements of the mining laws necessary to maintain a mining claim under the Savings Clause, section 37 of the Mineral Leasing Act. The Supreme Court in Hickel v. TOSCO, 400 U.S. 48 (1970), created such a standard but provided no definition of its meaning. The TOSCO decision which narrowly interpreted this phrase, and the Interior Board of Land Appeals decisions which broadly interpreted it, have all been vacated as moot.

The proposed rulemaking would make it clear that a resumption of assessment work after a lapse of any duration, but prior to initiation of a contest by the United States, would prevent invalidation of the claim for failure to substantially comply with the assessment work requirement. The resumption principle is an essential part of section 5 of the Mining Law of 1872 (30 U.S.C. 28). Section 5, among other things, contains the $100 annual assessment work requirements and allows a third party to relocate the claim when the original locator fails to perform the annual labor. Section 5 then

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provides that relocation is barred if the original locator has resumed performance of assessment work. The Supreme Court applied the resumption principle against the United States in *Wilbur v. Krushnic*. The Supreme Court recognized in the *Hickel* decision that the maintenance requirement of section 37 of the Mineral Leasing Act of 1920 (30 U.S.C. 193) allows the United States to stand in the place of a third party relocator under section 5 of the Mining Law. The Supreme Court in *Hickel* closely examined section 5 and held that an oil shale claimant must substantially comply with its provisions in order to maintain his mining claim and that the United States may properly invalidate a claim for failure to do so. But, the Court did not overrule the resumption holding of *Wilbur v. Krushnic* and, equally important, did not suggest that this holding was incorrect. In fact, the Solicitor General, in his briefs on behalf of the United States in the *Hickel* case, explicitly acknowledged that resumption is a valid defense to a contest for failure to perform annual assessment work.

On September 1, 1972, the Interior Department promulgated a final regulation requiring substantial compliance with assessment work requirements by all mining claimants. Failure to comply renders one's mining claim subject to cancellation. That regulation put the oil shale mining community on notice that the 1935 policy decision was reversed, but said nothing about the resumption principle and its effect against the United States.

The proposed rulemaking would place the burden upon mining claimants to prove that labor was resumed prior to the initiation of a contest if no affidavit of assessment work has been filed with the BLM under section 314 of the Federal

Land Policy and Management Act (FLPMA) for the previous 2 years. Of course, a notice of intent to hold a mining claim must have been filed in lieu of an affidavit of assessment work or the mining claim is conclusively deemed abandoned by operation by law, U.S. v. Locke, 471 U.S. 84 (1985). The requirement that the lapse be at least 2 years in length stems from the fact that in both Wilbur v. Krushnic and Ickes v. Virginia-Colorado Development Corp., where the Supreme Court held that the Government lacked authority to contest claims for failure to perform assessment work, the duration of the lapse was 1 year. This rulemaking would prospectively change this time period in recognition of the additional guidance on the Government's authority to contest claims for failure to substantially comply with the assessment work requirements which the Supreme Court provided in its 1970 Hickel decision.

The Department does not propose to adopt a rule recognizing that $500 worth of assessment work constitutes substantial compliance for the life of the mining claim. The $500 requirement is one of the criterion for receiving a patent established by section 6 of the Mining Law (30 U.S.C. 29). The Department rejects any relationship between this requirement and substantial compliance with the annual assessment work requirement.

The principal author of this proposed rulemaking is William Condit, Division of Mining Law and Salable Minerals, Bureau of Land Management, assisted by the staff of the Division of Legislation and Regulatory Management, Bureau of Land Management.

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The changes made by this proposed rulemaking will have a very insignificant effect on an oil shale placer claimant, whether large or small, because they place in regulatory form the judicial and administrative case law interpretations of the provisions of the Mining Law. The changes should accelerate the processing of applications for patent on oil shale placer claims.

This proposed rulemaking contains no additional information collection requirements that require clearance of the Office of Management and Budget under 44 U.S.C. 3507.

Lists of Subject for 43 CFR Parts 3840 and 3850

43 CFR Part 3840

Mines

Public lands - mineral resources

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43 CFR Part 3850

Mines

Public lands - mineral resources

Under the authority of sections 2322, 2324, 2331, 2337, 2328 and 2330 of the Revised Statutes (30 U.S.C. 21 et seq.), the Act of May 10, 1872, as amended (17 Stat. 91), the Act of August 4, 1892 (30 U.S.C. 161), the Mineral Leasing Act as amended and supplemented (30 U.S.C. 181 et seq.), the Act of June 21, 1949 (30 U.S.C. 28b-c), the Act of July 23, 1955 (30 U.S.C. 611), the Act of February 11, 1897 (29 Stat. 526), and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.), it is proposed to amend Parts 3840 and 3850, Group 3800, Subchapter C, Chapter II of Title 43 of the Code of Federal Regulations as set forth below:

PART 3840 - NATURE AND CLASSES OF MINING CLAIMS - (AMENDED)

1. A new authority citation is added to Part 3840 to read:

Authority: 30 U.S.C. 21 et seq., 17 Stat. 91, 30 U.S.C. 161, 30 U.S.C. 181 et seq., 30 U.S.C. 611, 29 Stat. 526, and 43 U.S.C. 1701 et seq.

2. Section 3842.4 is revised to read:

§3842.4 Petroleum Placers.

(a) The Act of February 11, 1897 (29 Stat. 526), provided for the location and entry of public lands chiefly valuable for petroleum or other mineral oils. Entries of that nature made prior to the passage of that Act are to be considered as though made pursuant to the provisions of that Act. That Act was superceded by the Mineral Leasing Act as amended and supplemented (30 U.S.C. 1818 et seq.). Section 37 of the 1920 Act as amended (30 U.S.C. 193) excepts from its coverage valid mining claims existing on February 25, 1920, and thereafter maintained in compliance with the laws under which the mining claims were initiated.

(b) In order to establish the validity of an oil shale mining claim held under section 37 of the Mineral Leasing Act, a mining claimant shall demonstrate that there was a discovery of a valuable oil shale deposit within the meaning of the mining laws on February 25, 1920, or that the claimant or his/her predecessors in interest were diligently seeking to make such a discovery.

(c) Discovery of a valuable oil shale deposit shall be show to exist by an exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim yielding 15 gallons or more of shale oil per ton of rock, in beds not less than one foot thick, yielding 1500 barrels or more per acre. Further this standard may be met by an exposure of a marlstone tongue of the Green River Formation, yielding not less than three gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the uppermost strata of prospectively valuable rich beds of oil shale lying at depth within the boundaries of the mining claim, but the inferred connection of the qualifying marlstone tongue need not occur within the confines of the mining claim.

PART 3850 - ASSESSMENT WORK - (AMENDED)

3. A new authority citation is added to Part 3850 to read:

Authority: 30 U.S.C. 21 et seq., 17 Stat. 91, 30 U.S.C. 181 et seq., 30 U.S.C. 611, 29 Stat. 526, 30 U.S.C. 28b-c, and 43 U.S.C. 1701 et seq.

4. Section 3851.3(a) is revised to read:

"(a) Failure of a mining claimant to comply substantially with the requirements of section 5 of the Act of May 10, 1872 (30 U.S.C. 28) shall render the mining claim subject to contest proceedings under Part 4 of this title, if the mining claim was located for minerals of a type no longer subject to disposition under the mining law or embraces lands subsequently closed to the operation of the mining law. In order to meet the requirement for substantial compliance, the claimant shall annually perform not less than $100 worth of labor or make improvements in such amount in an effort to develop a valuable mine. Resumption of qualifying assessment work, prior to the initiation of a challenge by the United States, is an absolute defense in a contest brought on that basis. For lapses that occurred prior to the

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effective date of this section, the United States shall not initiate contest proceedings for any lapse of 2 years or less. After the effective date of this section, a lapse of 1 year, without resumption of labor, is sufficient basis upon which the United States may initiate contest proceedings. The requirements of this paragraph are in addition to those in subpart 3833 of this title."

Secretary of the Interior

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Question from Senator James McClure

1. What is the view of the Department of the Interior with respect to the application of the so-called resumption principle to government challenge of oil shale mining claims on the basis of past non-performance of assessment work?

This issue is currently under review by the Secretary. One approach is described in the draft regulations. The rule defining the requirement for substantial compliance with assessment work requirements would require the performance of not less than $100 worth of labor per claim each year, except that resumption of labor after a lapse of annual labor, but prior to the initiation of a contest is an absolute defense against the charge of nonsubstantial compliance. However, the Secretary has yet to review or adopt the view expressed in this draft rule.

Supreme Court Precedents

Wilbur v. Krushnic, 1930; assessment work alleged to have lapsed for one year. Resumption principle of the mining law is operative against Federal Government as well as rivals.

Virginia-Colorado Dev. Corp. v. Ickes, 1935; assessment work lapsed for one year and would have resumed were it not for contest initiation. One-year lapse is insufficient basis upon which to challenge claim. Strong dicta that it is never the business of Gov't to inquire into assessment work performance.

Hickel v. TOSCO, 1970; assessment work lapsed for many years. Federal Gov't may indeed inquire into substantial compliance with assessment work performance, though left undefined. Claimants were given opportunity on remand "to bring their claims within the narrow ambit" of the earlier decisions.

Rationale for proposed standard

Interior (and Justice Department) acknowledged to the Hickel Court that resumption principle of Wilbur was good law and did not seek its reversal.

Majority in Hickel expressly refused the minority's invitation to overturn the 1930's cases if case were to be decided in favor of the Government.

Resumption principle is a strong holding in Wilbur thus is part of the "narrow ambit" claimants were invited to come within.

One-year lapse of labor is insufficient grounds for BLM to contest upon, based upon Virginia-Colorado holding, thus substantial compliance must allow some lapses.

APPENDIX II

Additional Material Submitted for the Record

2605 Stanford Avenue
Boulder, CO 80303
August 10, 1989

The Honorable Senator Jeff Bingaman
Chairman, Subcommittee on Mineral
Resources Development and Production
U.S. Senate Committee on Energy and Natural Resources
Washington, D.C. 20510 Room 364 Dirksen

Dear Chairman Bingaman:

I am submitting my Statement for inclusion in the record of your Senate Hearing on oil shale bills H.R. 2392 and S.30, 101st Cong., on July 31, 1989. I have been concerned about the disposal of oil shale lands by the Federal Government based on tenuous pre-1920 mining claims for over a quarter of a century. My interest in this goes back to the time when I served in the U.S. Bureau of the Budget/Office of Management and Budget as a senior analyst.

This Statement provides information and analysis on the issues involved in these bills and other proposals for disposal of these trillion-dollar Federal resources. It raises a series of points which I earnestly commend to the consideration of the Congress. It also makes certain recommendations which I believe would serve the public interest.

Please insert this letter and the accompanying Statement and its attachments in your printed Hearing record and send me two copies of it when it is issued. Kindly send me two copies of the bill and the report by the Senate Committee when they are issued. Also please send me the language on oil shale in the omnibus appropriations bill when the House and Senate consider it.

Respectfully,

Michael S. March

Michael S. March, Ph.D.
(303) 494-4871

Enclosure: Statement
and attachments

STATEMENT ON

S.30 and H.R. 2392 AND RELATED OIL SHALE ISSUES FOR THE SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

BY MICHAEL S. MARCH, Ph.D.

As a citizen who believes that the U.S. Government should serve the public interest, I urge your Committee to make sure that every oil shale claim that is henceforth patented or used as a basis for a lease be fully and rigorously reviewed to make sure it meets the intent and the provisions of the U.S. mining laws under which the claim was located. Out here in Colorado newspapers have reported for many years that the U.S. Government was engaged in "giveaways" of oil shale lands. As the Reagan administration was ending, the Department of Interior announced that it was beginning another round of disposals which might total 250,000 acres of public domain. Bills S.30 introduced by Senator Wirth and H.R. 2392 by Representatives Rahall and Campbell, et al., relate to that acreage.

From the time in the early 1960's when events first involved me in oil shale matters, I have believed that genuine miners who could meet the full requirements of the U.S. mining laws, should be entitled to all the benefits which those laws accord. But please bear in mind that in the oil shale area, two facts stand out which raise a red flag about oil shale mining claims:

1. The oil shale mining claims at issue were all located, purportedly, before February 25, 1920. Some 430,000 acres of such mining claims have gone to patent for $2.50 an acre. The individuals or companies who were lucky enough to receive patents have been able to sell them for $2,000 or more an acre -- and become "instant millionaires". (See "Post Hearing Brief and Appendix for the Contestant," in BLM (Colorado) Contests 359 and 360, Vol. 1, p. 19.)

2. Despite these enormous divestitures of valuable lands from the public domain -- lands which contain literally hundreds of billions of barrels of potentially recoverable oil -- there is no unsubsidized, commercial shale oil production in the United States -- and no visible prospect of a viable industry until the Middle East oil reserves run out around the middle of the 21st century. This raises the stark issue of whether the true intent and purpose of the U.S. mining laws has been met through the years. Or do we have working here, the infamous iron triangle of claimants seeking great riches for negligible mining efforts, a pro-claimant Bureau of Land Management which grants valuable mining claim patents without proper review of their validity, and Subcommittees and Committees of the Congress which, for whatever reasons, allow the public domain to be divested without making sure that the law is being complied with?

Over the years, since the early 1960's, I have seen a substantial stack of Department of Interior briefs on oil shale cases -- and have been educated somewhat on them by my brother, Fred S. March, who in the late 1950's and early 1960's handled oil shale cases and matters in the Office of the Regional Solicitor in Denver of the U.S. Department of Interior. He has a law degree from the University of Colorado and a Masters Degree in law from the University of Texas. Before joining the Department of Interior he worked for an oil company both in the field and in their Washington office, where he became intimately acquainted with the land records of the old Government Land Office. I have a Ph.D. from Harvard in Political Economy and Government and have completed careers as a top level analyst in the Executive Office of the President and as a Professor of Public Affairs at the University of Colorado.

I confess that what I have learned gives me considerable unease about whether the laws enacted by the Congress relating to oil shale lands have been faithfully executed and complied with by the Departments of Interior and Justice in disposing of oil shale lands for $2.50 an acre -- and in proposing to continue such disposals in 1989 on a vast scale. I am aware that Bush Administration Secretary of Interior, The Honorable Manuel Lujan, Jr., has put a temporary hold on patenting, but what this means no one can foretell given the history of disposals in decades past and the predisposition of holdover appointees in the Department to continue disposals. I am uneasy because in 1986 the Executive Branch severely shortchanged the public interest by disposing of 82,000 acres of oil shale claims for $2.50 an acre and now the Congress is generating bills which would validate continuation of disposals of additional questionable claims. Who is protecting the public interest?

House-Passed H.R. 2392 Is Defective

In my opinion H.R. 2392, passed by the House June 1, 1989, and its supporting legislative record do not protect the public interest adequately in the 250,000 acres of claims the Department of Interior proposed to patent. During 1988, as I describe below, I observed the so-called Colorado Oil Shale Legislation Committee. It was dominated by claimants and their attorneys and did not include any really knowledgeable and vocal representation of the public interest. I thought that the representatives of the Colorado government, in promoting disposals, were acting contrary to the State's best interest by carrying out Mr. Cason's policies. Denver-area Interior Attorneys who have extensive knowledge of oil shale legislation and law were not present. Interior staff who came seemed to me to be carrying out the political instructions of Mr. James Cason. He had signed the 1986 "Settlement" for the Department. In early 1988 he reputedly told claimants in a big meeting to file their claims looking toward processing of further disposals after the 1988 Presidential election. Your Subcommittee should request the correspondence, the draft bill, and the minutes of Cason's dealings with oil shale claimants to complete your hearing record. Needless to say, I did not know early in 1988 about his plans, but saw the process unfold later in 1988.

House Bill H.R. 2392 has been widely publicized as stopping the oil shale claim "giveaways" at $2.50 an acre. But my assessment of the House-passed bill is that it gives the claimants much of what they want -- and much more than the intrinsic merits of their claims warrant. For instance:

1. H.R. 2392 (and also S.30) would in effect give statutory validation to disposal of oil shale claims which in 69 years I feel have never actually met the purposes of the U.S. Mining laws. I doubt that any of them have ever produced a barrel of profitable commercial oil -- and the bill itself in section 1 states that "almost none" of the claims have been developed. Of the 250,000 acres, have any had any real mining development? In oil shale, the patent rights do not vest until the last Federal signature is affixed, so the cries about "vested" rights should be severely discounted.

2. Both bills would authorize immediate disposal of 7,270 acres of these claims at $2.50 an acre. At $2,000 an acre this would enrich claimants by $14,500,000 -- or by $58,000,000 if they were to get $8,000 an acre. Exactly what sorts of review did Interior staff do on these claims before they were put on this preferred disposal list? Who, if anyone checked the claims out against the list of "arguments" by DOI staff which I attached to my Statement to your 1987 Committee in S. Hrg. 100-527 at pages 224-242 and summarized at pp. 265-266? Such thorough review on all criteria should be required before any patents are granted. Neither H.R. 2392 nor S.30 requires such review. What justifies these disposals when social programs for the poor are being cut?

3. The House bill would empower the Secretary of Interior to promulgate rules and regulations for determining the validity of the rest of the 246,000 acres of oil shale mining claims. I fear this is a set-up for giveaways. At the Colorado Oil Shale Legislation Committee Mr. James Cason through subordinate staff proposed use of only two criteria: "Discovery" and "maintenance," as I remember it. We know that the "discovery" criterion was converted into a laughable non standard by the questionable and erroneous Freeman vs. Summers decision in 1927. With respect to "maintenance"

of the claims, how many meet a rigorous review against my list of criteria on pages 265-266, in the document cited in point 2 above?

Furthermore, DOI briefs are replete with information highly suggestive of fraud in "locating" claims, using "dummy locators," and revival of abandoned claims. DOI made many decisions in the 1930s declaring claims "null and void." Are they being heeded now? For instance see my excerpt in S. Hrg. 100-527 at pages 195-224 from the 5-volume DOI brief prepared in 1968. Also see attached letter to this Statement dated June 16, 1980, by the Acting Regional Solicitor in Denver. Does the Senate wish to go along with giving the Secretary of DOI the power to set the rules for disposing of more claims, given the flagrant 1986 DOI "giveaways?" I believe the Congress should by law stipulate a comprehensive list of criteria such as those that I describe in point 2 above and repeat later in this Statement.

One specific point: Why do DOI and the bills here reviewed overlook that the oil shale claims were actually located subject to the Oil Placer Act of 1897, which required such claims to be "chiefly valuable" for oil shale -- and not, for instance, for grazing? When have these claims ever produced valuable, profitable shale oil?

4. The Rahall-Campbell bill sets a very short deadline for DOI review of the 246,000 acres of claims. That provision in itself is sufficient to assure only pro forma review of these 1,600 claims -- so Congress to satisfy the claimants would, in effect, be dictating a new "giveaway" to match the 1986 Executive Branch "giveaway." The difference in the instant case is that Congress is really creating new statutory authority to validate claims which have in most cases probably not been put through "contests." These bills, in effect, set aside the longstanding body of law governing oil shale patents and turn the whole matter over to a "giveaway-minded" DOI. This reminds me of the HUD Housing and the S & L scandals in which Congress failed to take action to stop public losses. In this oil shale matter Congress, in effect, would be authorizing patents on claims by statute on the highly questionable presumption that they are valid. That is plainly wrong and contrary to the public interest. Why do it?

5. Nowhere in the record on H.R. 2392 have I been able to find any information on the estimated quantity and value of potential recoverable shale oil and other minerals in each of the 3 batches of claims listed in House Report 101-65. This suggests a "pig-in-the-poke" giveaway. Surely the American public is entitled to full information on how much the Congress proposes to give away before it decrees issuance of patents or leases under the guise of stopping giveaways.

6. The same thing happened in the 1986 Interior "Settlement." No pertinent information on values was released by either the House or the Senate Committees handling oil shale. A skimpy report, never officially released, was prepared by investigative staff of the House Appropriations Committee. No Committee of the Congress has ever thoroughly investigated the 1986 disposal, which was estimated to have divested 42 billion barrels of potential shale oil from public ownership. The House Interior and Insular Affairs Committee did not even print the record of its hearings on the 1986 Settlement, or on the subsequent bill it reported -- and it has thus far not published its 1989 hearings leading to House passage of H.R. 2392. Obviously the public is being denied relevant information on matters of large public impact. The Congress should authorize a full scale review of the 1986 "Settlement" with the aid of GAO.

7. The main sponsor of H.R. 2392 on June 1, 1989 on the floor of the House stated that "H.R. 2392 has no effect on previously patented claims." (Congressional Record, H2254-H2255.) This could be construed as creating a legislative record that Congress regards the 1986 Settlement as valid. That Settlement was highly questionable in my view. As subsequent sections of this Statement indicate, Tosco v. Hodel (1985) was erroneous and wrong in the eyes of professional DOI attorneys in Denver. That decision, which was vacated after the patents were granted, covered only a fraction of

the 82,000 acres -- so the remainder were "thrown in," willy-nilly. How valid were the "thrown in" claims? In view of the many factual statements in DOI briefs (especially the 5-volume 1968 brief and the Weber case briefs) indicating possible fraud, the Congress should at a minimum request the GAO to review fully the 1986 disposals, as well as other past disposals, of oil shale lands to determine whether they conformed to the intent and purpose of the U.S. Mining laws under which these claims were allegedly staked. I have outlined the scope of such a review and related actions in S. Hrg. 100-527 at pages 268-270.

8. Numerous other deficiencies of bills similar to S.30 and H.R. 2392 were identified in my earlier Statement to your Committee in S. Hrg. 100-744 at pages 291-307.

9. One new provision in H.R. 2392 would permit extension of the life of existing unpatented oil shale claims for 31 more years. Undoubtedly this appeals to the claimants, because the book on Beyond Oil projects the U.S. supply of gas and liquid oil reserves to run out about that time. Basically, the claimants would get a "free ride" for 3 more decades, to the time when shale oil would likely became intrinsically more valuable economically -- instead of being only speculatively valuable now. I say "free ride" because I would be surprised if the big $2,000 and $5,000 payment rates by claimants in H.R. 2392 would hold up under pressure of the claimants in the rest of the legislative process. Past records show that oil shale claimants get their way.

Once the Congress mistakenly accepts a presumption that these unpatented claims are valid, it will lose the entire acreage. The proper way to protect the public interest is for the Congress to stipulate by law that each and every claim must meet all the tests that existing laws and rules require -- and do so through a full investigation of validity. There is no hurry now for quick action, since the claimants have not been in a hurry to develop oil shale for 69 years.

10. H.R. 2392 would lift the existing acreage limit from the unpatented claims. This is clearly a giveaway to big claimants. It will result in a general lifting, retroactively. Why start this process now? How much oil monopoly do we need in the U.S.?

11. Reports are circulating that the House Interior Committee has acted to insert the language of H.R. 2392 into the omnibus appropriation bill process to force the Senate to consider the House bill in the conference process on appropriations. In my view the granting of millions of dollars worth of oil shale rights to claimants is just converting the omnibus appropriation bill into a public lands "pork barrel." The Senate ought to kill the House language. President Bush should have OMB Director Darman put oil shale giveaways on the list of management scandals for OMB and the Interior Inspector General to investigate.

Questionable Actions in Interior Administration of Oil Shale Lands Historically.

There is much pertinent information bearing on the invalidity of the pre-1920 oil shale mining claims contained in the U.S. Department of Interior "Post Hearing Brief and Appendix for the Contestant" in U.S. v. Frank W. Winegar, Shell Oil Company, BLM (Colorado) Contest 359; and U.S. v. D. A. Shale, Inc., Contest 360, dated May 20, 1968. This 5-volume Brief of approximately 1,600 pages represents a most thorough analysis of applicable law and decisions on oil shale discovery law. It also reveals and documents how oil shale lands have been mismanaged by the government. This information is supplemented by the Department's Post Hearing Brief(s) and Answer Brief in 1982 in the case of U.S. v. Weber Oil Company, in BLM Colorado Contests 193, 260 and others. Drawing on these briefs and other knowledge a few highlights in the development of Federal oil shale disposal policy stand out:

1. The oil shale claims at issue were not filed under the general U.S. mining laws, but under the Oil Placer Act of 1897 (29 Stat. 526). That Act contained the significant words that the lands had

to be "chiefly valuable" for placer claims to be located under this Act. I know that for nonmetalliferous minerals of widespread occurrence, as is oil shale, patents on claims are not allowed unless the claimant can show present marketability at a profit from his claims. How could Interior have patented all the prior oil shale lands without requiring the same proof? Were these oil shale placer claims economically valid when they were initially located under the terms of the "chiefly valuable" requirement. (See Interior Instructions, May 10, 1920, re "Oil Shale Placer Claims," 47 L.D. 548 at 550, quoting DOI letter to Senator Myers.)

2. The Department's 1968 "Post Hearing Brief" at pp. 19-24 points out that the first oil shale patent which was issued in 1920 was in disregard of the Department's own instructions and relevant rulings of the U.S. Supreme Court regarding the determination of discovery to satisfy the mining law.

3. The Department's decision in Freeman v. Summers, 52 L.D. 201 (1927) has been analyzed at length in Volume 1 (pp. 20-25) and Volume 5 (pp. A-1153 to the end of the Volume) of the Department's 1968 Post Hearing Brief on Contests 359 and 360. (See Volume 1, p. X, for additional citations.) Freeman was a miner who claimed certain land; Summers was a homesteader on it. The Department of Interior first sided with the homesteader in 1924. But the Secretary of Interior came under pressure from a delegation of "power brokers" from Colorado in December 1926. The First Assistant Secretary of Interior, E. C. Finney, thereupon personally wrote the 1927 decision to favor the miner over the objections of the then Solicitor and the professional staff of the Department.

Interior's 1968 Briefs in Contests 359 and 360 point out that Finney's interpretation of both the geology and of the mining law were in error. Yet Freeman vs. Summers became the purported basis and rationale for granting oil shale patents by the Federal government. (For a listing of the Department's discovery-related issues see the excerpts from the 1968 Brief that I submitted for the record in the October 16, 1987 Senate Subcommittee Hearing., S. Hrg. 100-527, pp. 194-242. See also my questions about that decision at p. 187 of that hearing document.)

4. The Department of Interior's then professional staff in Denver, particularly Mr. Ralph Kelley, strongly challenged the correctness of Mr. Finney's decision in Freeman v. Summers. Toward the end of the controversy, Mr. Kelley, a 25-year career attorney was called into Washington and ultimately was dismissed with opprobrium. His career was ruined for his efforts to assure that the law was properly applied to pre-1920 oil shale claims. (See Vol. 5 of 1968 "Post Hearing Brief," pp. A-1153 ff.) With that tragic example of the power of political influence over earnest professional endeavor to uphold the law, Freeman v. Summers became the basis for granting oil shale patents well into the late 1950's. With that instructive example before them of the dangers of refusing to grant patents, the Department of Interior's staff in the BLM continued to patent oil shale claim's without pertinent analysis of whether they were valid. (See 1968 Interior Brief, Vol. 1, pp. 357-366.)

5. Attorney Fred S. March was hired by the Department of Interior in early 1953 and around late 1954 was assigned to examine several abstracts of title relating to oil shale claim applications in the Denver Regional Solicitor's Office. He discerned that the procedures for adjudicating claims to patent were not coordinated between the lawyers and the BLM staff. Pertinent land records were scattered between Washington and the field and were not being used properly in the BLM and were not available to attorneys in the newly created Regional Solicitor's Office in Denver Federal Center. There was no training program for the attorneys who were signing off on the possessory titles. (See 1968 Interior Brief, Vol. 1, p. 23, to effect that after 1927 oil shale claims were patented "automatically." See my excerpt of that part of the Brief in S. Hrg. 100-527, p. 220.)

No one from the BLM or the Regional Solicitor's Office told March about the enormous controversy over Freeman v. Summers or about problems in the BLM in issuance of patents thentofore on claims that had been declared null and void by the Secretary for fraud in "location" and other reasons.

March participated in about 1955 in discovering that a patent had been issued erroneously in 1951. Subsequently in 1960 he procured the case files underlying the Freeman v. Summers decision and then discovered that the decision was the product of a "political fix" in the Interior Department and was in error on geologic facts. March sought to get the Department to contest questionable oil shale claims.

March's positions on oil shale were accepted in 1958-1960 at the top levels of the Interior Department in the Eisenhower administration. Contests were begun and patenting of claims was virtually halted.

Fred March, utilizing his substantial legal training and experience in land and mineral law and his previous background in economics, undertook to mobilize the Denver elements of the Department of Interior to prepare contests adequately, based on a substantial number of charges against some pending claims which were assigned to him to review.

During President Kennedy's tenure claimants through a powerful Congressman exercised heavy pressure on the Department. March was personally attacked by the Congressman on behalf of a claimant with large holdings of claims. Eventually, this resulted in efforts by March's immediate superiors and the BLM to stop proper preparation of the then pending contests. His previously approved memoranda for preparation by BLM of the contests were abrogated orally in April 1962, his contacts with BLM were cut off, and he was rendered ineffective in his position.

Earlier, in the fall of 1961, when I became aware of the real problem in getting contests prepared, I wrote an Employee Suggestion in the Bureau of the Budget pointing out that action was needed at the top of the Government to correct the breakdown of governmental processes in Interior in oil shale and other mineral matters. I submitted it to the top level of the Bureau of the Budget which to this day has never evaluated my Employee Suggestion as such and responded to me on its value. But this issue went to the White House, which initially sought to dismiss it by having Interior answer some rather general questions about the status of oil shale mining claims. The Department assured the BOB and the White House that, in effect, everything was fine. Later, in 1962, when I found out about the response, I prepared a memorandum pointing out the factual inconsistencies and provided a list of tough questions for the White House to ask Interior.

My memos ultimately reverberated through the top levels of the administration, but BOB, the White House, and then Secretary Stewart L. Udall did not take truly effective action to clean up the mess leading to questionable disposals of valuable oil shale lands. Their efforts were far short of the magnitude of the problems. In the end, the oil companies who were sued by the government in connection with matters relating to questionable issuance of patents used my reports as a basis for defending themselves by the argument that top officials had full notice of probable erroneous issuance of patents -- and did not act timely to correct the mess in the Interior Department, of which they were put on notice. (See U.S. v. Eaton Shale Co., 433 F.Supp. 1256 (1977) at pp. 1265 (footnote 5) and p. 1266 for description of the involvement of top officials. The Judge did not, however, recite the facts which I had presented to my superiors at the BOB so the nature of the mess in the Department would be evident.)

Based on false information from the Regional Office, the Deputy Solicitor of the Department of Interior ordered Fred March to Washington, in a ploy reminiscent of the Kelley debacle. Determined efforts were made by the Department to get rid of Fred March. These efforts continued into the Johnson Administration. But his appeals were successful, and after threats to ship him to Nome, Alaska if there was an office there, he was reassigned to the Portland, Oregon Regional Solicitor's Office. Eventually he was transferred by Reorganization Plan in 1970 to the newly-created Environmental Protection Agency. He served there until late in 1976.

The removal of the knowledgeable and motivated Fred S. March from oil shale in the 1960's, following the pattern established in the 1930's for Ralph Kelley, in my judgement meant that in the end the Reagan Administration disposed of 82,000 acres of rich land for a negligible sum and an additional 250,000 acres more hang in present danger of such disposal in early 1989. DOI attorneys in Denver who questoined Tosco v. Hodel (1985) were sidelined from oil shale by Reagan officials.

6. Although the efforts to remove Fred March from the Denver Office were successful, Frank S. Barry, then Solicitor of the Department of Interior, initially adopted some of the substance of Fred March's earlier recommendations. The Department sought to overrule Freeman v. Summers. But the Department basically limited its challenge to the issue of "discovery" in Contests 359 and 360. The Department did not use all applicable charges in these cases -- and there are many of them, as I point out later in this paper.

On the issue of "old decisions" in which claims had been declared null and void by the Commissioner of the General Land Office, Barry also largely upheld Fred March's views. He upheld rejections of patent applications on approximately 200 claims. This resulted in litigation between the claimants and the U.S. government which went on for a quarter of a century.

Also, under one guise or another during the Secretary Stewart L. Udall's stewardship of the Department of Interior, every person in the Denver Regional Solicitor's Office that was even remotely considered to be sympathetic to the views that Fred March had held was driven out or separated. This included three attorneys and a clerk. I followed this closely and in my 33 years of U.S. government experience have never been aware of such an unjust and unwarranted process to remove dedicated employees and destroy their careers in order to cover up problems relating to disposals of rich oil shale lands to private lands so big oil can grab them.

During the turbulent years when Fred March was being given a "hard time" in Denver over his efforts to prepare oil shale contests thoroughly he managed to prepare three legal briefs on (1) the law of "discovery" and its proof, dated August 31, 1962; (2) whether the rules applicable to non-metallic minerals of widespread occurrence were also applicable to oil shale, dated September 28, 1962; and (3) the evidence which was applicable in oil shale contests, dated February 28, 1963. His immediate superiors in Denver sought to suppress these briefs, copies of which are now in possession of a senior staff member of the House Committee on Interior and Insular Affairs. While the Interior Solicitor's Office in Washington was trying to force March out of the Department, in my presence he offered to hand Solicitor Frank Barry a memorandum urging review of past erroneous disposals of oil shale claims. Later Fred compiled a listing of about 30,000 acres of oil shale lands which had been patented even though the claims had been declared "null and void" in earlier years. Fred was not allowed to complete his review because BLM denied him access to the land records, assertedly on orders of Solicitor Frank J. Barry. We supplied the listing to Kermit Gordon, Director of the Bureau of the Budget. As far as I know, no action was taken to recover those lands. Your Subcommittee should ask Interior to report on those matters.

These events were hashed over at length in depositions from Fred S. March and me taken by the oil companies in the case U.S. v. Mobil Oil Corporation and Equity Oil Company in the U.S. District Court in Colorado, Civil Action Number C-4135, in August 1975. Judge Sherman Finesilver sealed the settlement in that case along with the depositions which had been taken. However, this enabled another oil company to secure the benefit of my statements simply by subpoenaing me. The Judge himself in U.S. v. Eaton referred to the fact the oil shale issue had gone to the White House. I believe the Congress should request the Department of Justice produce their full files on that case and also make available to the Congress our depositions and the sealed settlement and clarify the real reasons for the settlement. Those records would reveal how Interior and White House officials failed to act when they were put on notice about oil shale problems.

My assessment of the oil shale problem and situation in 1975 after I had been deposed was reflected in my testimony before the Subcommittee on Fossil Fuels of the House Committee on Science and Technology. A copy of my statement was published in the Congressional Record of December 1975 at pp. H13046-13048, (daily ed.) which is hereby incorporated by reference. See also the 1975 Hearings, p. 2457 ff.

7. The issue of "old decisions" reached the Supreme Court in the case of Hickel v. Tosco, 400 U.S. 48 (1970). As a result of that case various claims were ultimately remanded to Interior for further action. The Department was given the opportunity by the Court to contest pre-1920 claims on all available charges, including abandonment and failure to perform assessment work, and raise whatever issues it wanted to raise about the validity of the claims. Unfortunately the Department of Interior did not take advantage of this opportunity to carry out a well-staffed, full-scale, properly-prepared evidence-gathering and contest program to challenge questionable oil shale claims on all appropriate charges. Claimants have alleged that the Department of Interior spent $100 million fighting them, but I question this figure and regard this as being propaganda to gain sympathy for claimants. DOI probably had more staff on its rolls working to promote disposals than fighting to prevent them. The Congress should explore this for the years 1981-88.

I have followed the staff in the Department of Interior Regional Solicitor's office since the early 1960's. It has always been small and did not have the muscle and the support from the rest of the Department to challenge questionable claims adequately. The real problem was that the attorneys in the Regional Solicitor's Office were never well prepared to put on proper evidence and effective cross-examination of patent applicants and their witnesses in the contest proceedings at the litigation stage, even though they wrote excellent "post hearing briefs" which demonstrated that the contested oil shale claims should be declared null and void for various reasons, including abandonment. (See Briefs for the Government in U.S. v. Weber Oil Co.)

In the consolidated contests in U.S. v. Weber heard in January 1982 the Department was outgunned. At the Federal Court level the Justice Department took over. The Subcommittee should find out whether there was adequate coordination between Interior and Justice and proper preparation to achieve effective representation of the U.S. in the proceedings in the U.S. District Court and in appeals to the higher Courts. Available information strongly suggests weak, even pro forma, Government efforts.

8. The decision in Andrus v. Shell (1980), in my view, represented a major Government failure because Contests 359 and 360 were narrowly focused on discovery issues -- and even the charge of "loss of discovery" was not adequately pursued. The Interior Board of Land Appeals in U.S. v. Frank W. Winegar, et al., 81 I.D. 370, 16 IBLA 112 (1974) failed to incorporate in its decision the manipulations in the Department which were described in the 5-volume brief in Contests 359 and 360 because board members were reluctant to reveal the questionable background of Freeman v. Summers (1927). The Interior Board of Land Appeals overruled Freeman, but left out of its written decision the massive evidence of manipulation and ex parte proceedings revealed in the Brief by the Regional Solicitor's Office in Denver. Chief Justice Burger, who wrote the Supreme Court's decision, thereupon went along with the lower Court decisions which breathed life into the erroneous Freeman v. Summers decision. The Justice was probably denied pertinent information.

The 5-volume Brief makes clear that the Freeman v. Summers concept that the oil shale was a continuous structure from the oil shale outcroppings on the surface through hundreds of feet of overburden to the rich oil shale below was in error (1968 Brief, Vol. 1, p. 22, footnote 18). The finding of thin layers of poor shale on the surface in no way "discovered" the really rich layers below hundreds of feet of non-shale, as subsequent Interior geologic research has showed. The concept that oil shale has "prospective" value was likewise inconsistent with the proper interpretation of the "prudent man" rule announced by the Department in Castle v. Womble, 19 L.D., 455, 457 (1894). It was not true in 1927 nor in 1980 that a prudent miner would expend his time and money on mining oil shale and extracting oil from it in the expectation that the present value of his income would exceed the present value of necessary development, production, refining, transportation and marketing costs. (See attached June 16, 1980, Interior memorandum, p. 2; and 1968 Brief, pp. 22-23.) Even in 1989 this is not a prudent expectation.

The acting Regional Solicitor in Denver and his staff strongly urged the Department of Interior in Washington to file a Petition for a Rehearing on Andrus. Their memorandum stated that the Court's decision overlooks or misapprehends important facts and points of law and that the Freeman v. Summers decision on which Andrus rested was "an infamous holding based upon a cavalier disregard of the public trust and the public's interest in potential oil reserves of billions of barrels -- now of a potential value of trillions of dollars... a gift to the oil companies now owning these pre-1920 located oil shale claims at a nominal purchase price of $2.50 an acre." (See enclosed copy of Interior memorandum of June 16, 1980, p. 4.)

The staff memorandum also pointed out that the government would receive $2,400 for a gross potential oil reserve value of $2.2 billion involved in the claims at issue. The Department of Interior in Washington did not request the Petition for a Rehearing. Your Committee should request the Department to send you copies of all its memoranda on that issue, including my urgings to the Department to file a Petition.

9. The next debacle was in the case of Tosco v. Hodel (611 F. Supp. 1130, D.C. CO, 1985) in which District Judge Finesilver ruled against the government on virtually every point. The staff in the Regional Solicitor's Office in Denver prepared a lengthy Draft Brief which demonstrated that the Judge's ruling on law or fact were wrong in virtually every point. However, in Washington the Departments of Interior and Justice would not submit the case for appeal. This action was astounding inasmuch as earlier official Departmental briefs amply demonstrated that the foundation case of Freeman v. Summers was in error on geology, violated the economic prudent man concept, and procedurally had been described as having involved ex parte proceedings and questionable actions by E. C. Finney, its writer, in overriding the professional views of Interior staff to force through an erroneous decision.

Instead the two Departments in 1986 agreed with claimants to a "settlement" in which 524 claims totaling some 82,000 acres of oil shale land were turned over to "claim owners" for $2.50 an acre. In the settlement the government retained rights to oil and gas and coal. The claimants got the valuable oil shale and associated minerals and the land except for 4,620 acres of surface the Government then did not own. There were some other relevant conditions.

It is significant that the claims specifically covered by the Tosco v. Hodel decision covered only a fraction of the lands disposed under the Settlement. The rest of the 82,000 acres were "thrown in" by the Department of Interior and Justice without ever ascertaining whether the claims were "on all fours" with even the criteria of Freeman v. Summers, deficient though those might be. The failure to appeal Tosco and the substance of the Settlement certainly cry out for Congressional investigation.

A limited investigation report prepared for the U.S. House Appropriations Committee, dated February 26, 1987, estimated that up to 42 billion barrels of potentially recoverable oil were involved in the disposal of the 82,000 acres -- and that potential undiscounted future lease, rental and royalty payments, if that land had been retained in public ownership could have totaled as much as $210 billion. Half would have been kept by the Federal government and half would have gone to State of Colorado governments.

10. In 1987 the Congress embargoed granting of patents on the outstanding claims, but at the apparent behest of "claim owners" the Senate added an additional 10,000 acres or thereabouts to the disposal list. However, the Congress did not use the embargo period to conduct a proper investigation of the validity of the oil shale claims still outstanding.

11. After the embargo expired at the end of September 1988, the Department of Interior, following the 1988 elections, announced that it was undertaking to grant patents on 250,000 acres of pending oil shale claims. This brought renewed stories in the Colorado newspapers about "giveaways."

I know of no publicly released government information on the quantities of oil shale or associated minerals, and the value thereof, contained in the oil shale lands which the Department of Interior proposed to divest from public ownership. My rough calculation is that if the 250,000 acres were all patented the government would receive about $1.1 million, the claimants could quickly sell the mineral rights to the oil companies for at least $500 million, and the gross value of the potential recoverable shale oil may well total $1.5 trillion. For this the American public would receive no prospect of a commercial oil shale industry until perhaps the middle of the 21st century, if ever. Your Committee should require Interior to report such specific information to you on the whole 250,000 acres -- and on each set of claims up for disposal 90 days before the patent or lease is granted.

The Oil Shale Legislation Committee

In 1988 the Denver Post carried a story to the effect that at an oil shale meeting in northwest Colorado, local officials, claimants, and staff members representing the two Colorado Senators and Representative Ben Nighthorse Campbell had agreed to create a committee to work out a compromise settlement on the pending oil shale claims in the West. I have been told that there were prior public meetings held. But I was not aware of any such process until I read about it in the Denver Post, July 16, 1988. The Denver Post story also reported that one of the beneficiaries of the 1986 Interior settlement had sold 17,000 acres of his patented oil shale to the Shell Oil Co. for $37 million. (See attached clipping.)

The Denver newspapers around that time, and also recently, carried stories that Senator Bill Armstrong was strongly supporting the claimants. Senator Timothy Wirth and Representative Campbell had bills which they had introduced in the 100th Congress which, it seemed to me, would have had the effect of turning over oil shale rights, and or control of such deposits, to claimants without any adequate investigation of the validity of such claims on all applicable charges.

I observed four meetings of the Oil Shale Legislation Committee after August 11, 1988. It was nominally chaired by a representative of the Associated Governments of Northwest Colorado, but the work for the group has been facilitated by Mr. Ronald Cattany, Assistant Director of the Colorado State Department of Natural Resources. An early draft bill incorporated a liberalized version of the erroneous Freeman v. Summers criteria which I surmise were used by DOI and Justice in the 1986 Settlement. It should be remembered that the Tosco v. Hodel (1985) decision was vacated by the Circuit Court in Denver after the Settlement because of the undesirable precedents in the decision, from what I could learn.

The attendance at the Colorado Committee consisted of claimants or their attorneys, plus some local government representatives and a few from environmental groups, the latter in attendance only part of the time. Some other people attended from time to time. Staff from the office of the two Senators attended a few times and the designee from Mr. Campbell's office submitted some written material.

In my view as a former participant in numerous Federal policymaking circuits, the issues involved in pending oil shale claims are of major national concern. Such a set of issues should be considered (a) by an advisory committee composed entirely of public members representing the whole U.S. rather than an unrepresentative committee of the sort that was created in northwest Colorado, and then (b) by Committees of the Congress, which beforehand have a thorough study made of the public policy issues involved in past disposals of oil shale and of the pending proposals for more disposals of Federal oil shale rights.

My recommendation to your Congressional Committee is that any so-called "compromise" from the Oil Shale Legislation Committee in Colorado should be disregarded for lack of proper representation on it of knowledgeable, designated, disinterested public interest members on the Committee. It is noteworthy that the attorneys in the Regional Solicitor's office in Denver, who have very substantial knowledge of oil shale legislation and laws, were not present at the meetings. They seem to have been completely "frozen out" from participation in this arena since the 1986 Interior-Justice settlement with the claimants. The Committee should secure their informed views based on their 1968 and subsequent briefs.

Early Pending Legislation in the 101st Congress.

S. 30 has been introduced in early 1989 by Senator Wirth and others and H.R. 643 by Representative Rahall for himself and others, including Mr. Campbell of Colorado.

S. 30 would permit the owner of any "valid" oil shale mining claim to continue the claim so long as $1,000 of labor or improvements shall be performed each and every year -- or to obtain a 20-year lease on the claim pursuant to the Mineral Leasing Act and for longer if oil is produced in commercial quantities therefrom. No rate of rental is specified in the bill. While the term "valid oil shale mining claim" is used, the bill contains no requirement that the Department of Interior shall determine validity nor specifies a set of comprehensive criteria for use in such determination. As a former legislative analyst it is clear to me that once the Congress extends such claims without proper, rigorous adjudication of validity on all appropriate criteria, it will only be a matter of time, in my view, before the claimants are able to get full title to these minerals. The government will, in effect, have conceded that they have valid rights in the claims, contrary to existing law. S. 30 is inadequate to protect the public oil shale domain from improper divestiture or giving of control to claimants. (For additional analysis see my comments on S. 2089 in S. Hrg. 100-744, April 22, 1988, pp. 291-307, which is incorporated herein by reference.)

H.R. 643 stipulated that the Secretary of Interior shall determine the validity of all unpatented oil shale claims in two years -- but did not specify comprehensive criteria for determination of validity. The two-year time limit would preclude proper adjudication of validity. It could be construed to be a mandate for "automatic" adjudication of validity, probably on the basis of the standards in Tosco v. Hodel. The bill also provides for an election between a lease vs. maintenance of the mining claim by complying with all provisions of the mining laws. However, it is left up to the Secretary of Interior to specify the exact requirements by regulation, which is undesirable. If the Department is pro-claimant, as it was in 1986, will it discharge its public obligations properly? Moreover, as in S. 30 there are certain exemptions. If leases are elected, the existing acreage limitations are removed. Why should that be done? To facilitate monopoly?

It is my belief that both these bills are unnecessarily slanted to turn over valuable oil shale rights to claimants without proper review of the validity of the claims. While they would terminate further applications for patents after January 24 or 25, 1989, they would permit patents to be granted on pending claims for which all requirements had been met. I surmise that the acreage for which all the inadequate current "requirements" of Interior have been met was around 10,000 acres. From listening to the Oil Shale Legislation Committee I inferred that a drive is on by claimants and others to "grandfather" 50,000 acres of valuable oil shale rights for patenting at $2.50 an acre. H.R. 2392 as passed by the House carries out this agenda of the claimants, except that it sets some dollar figures they will fight to reduce. My rough calculation is that this would mean a gift to the claimants of between $100-250 million, which would be the probable immediate speculative market value of the oil shale rights. Moreover, even if this acreage were not grandfathered, in the course of the legislative process, it would be a simple matter for the claimants to keep securing legislative extensions or reductions of maintenance requirements until they get the "whole works" by patents. Something is wrong in our country.

These bills do not address the fundamental public policy issues relating to these 69-year-old oil shale mining claims which I believe the Congress should consider if it is interested in protecting the public interest in these valuable resources. In listing the following issues it is my intent that legitimate rights of claimants to oil shale mining claims should be protected on a par with the interests of the general American public. But, I do not believe the rights of the public have been adequately represented through the years by the U.S. Departments of Interior and Justice in the oil shale cases. Furthermore, most of the issues which I list below have not been considered at all by the Oil Shale Legislation Committee because there has been no one on the Committee who was interested in raising them.

Major Outstanding Public Policy Issues Relating to Pre-1920 Oil Shale Claims and Pending Bills Relating to Them.

1. Approximately 430,000 acres of rich oil shale lands, containing several hundred billion barrels of shale oil, have been "sold" for $2.50 an acre. How does this huge disposal from the public domain square with the requirements and purpose of the U.S. mining laws? Why is there no viable commercial oil shale industry in the United States? Was not the real purpose and intent of the mining laws that for the land to be patented the miners should develop and put minerals in the marketplace? Is the mining law failing to accomplish its intended purpose where oil shale is concerned? Why should patents be granted on oil shale claims which have no real prospect of development?

2. Some 300 billion barrels of potentially recoverable oil are probably contained in the acreage the Federal government has patented through 1987. This is on the order of ten times the oil and gas in identifiable U.S. oil and gas fields. Privately held oil shale is probably enough for a century or two of mining, given the fact that no viable shale oil industry is in sight. Why should the U.S. government be allowing any more of the oil shale to be patented or otherwise put in private control? What would be the public purpose of such steps?

3. The pending oil shale mining claims are at least 69 years old. Many of them have passed through various and often different hands. In some instances present owners or their agents might have bought the "rights" to an abandoned claim from one co-locator for possibly only pennies an acre and "forfeited out" the other co-tenants out of the 8 for a 160-acre claim. Under such circumstances how can present "claimowners" establish that the claims have been continuously in force ever since they were first located? Does DOI have any stipulated procedures for determining factually whether each claim has been maintained continuously since its location? Does DOI consider that when oil in the Texas and Oklahoma fields in the 1930's sold for less than $1 a barrel oil shale claims were essentially worthless as economic ventures and hence their owners suffered "loss of discovery" because the minable oil shale mineral was no longer valuable under the laws which then prevailed?

4. A cursory review of maps on oil shale mining claims that have been patented to date, and those that are actively being sought for patent, show that they tend to be located in contiguous blocks, covering large areas. How can it be that claims so uniformly met the requirements of the mining laws for validity? Or, did the government neglect to review the validity of the claims in disregard of numerous appropriate criteria which Interior lawyers in the past have identified as being pertinent, so

the land went to patent? Were these the results of the "automatic" patenting of claims Interior briefs in 1968 described?

5. Of the 430,000 acres, more or less, that have heretofore patented, what active development to produce commercially marketable shale oil from them has occurred and is under way? What proportion of those lands has simply been "stockpiled" by oil companies against the future time, well into the next century, when liquid and gas hydrocarbons run out? What proportion of the patented acreage of oil shale is owned by oil companies? What public purpose has been served by divesting these energy-rich lands from public ownership, particularly under circumstances of mismanagement and maladministration in disregard of applicable law? (See 1968 Interior Briefs.)

6. The oil shale mining claims were located under the Oil Placer Act of 1897 which stipulated a more rigorous standard for validity then was generally applicable to other minerals. However, through the years the criteria for patenting oil shale mining claims have been relaxed substantially from those generally applicable to other minerals. How and why did this happen? Was there a valid public purpose for relaxing the criteria for oil shale mining claims? If such a purpose has been specified, how has it served the public interest? Or, have oil shale disposals been a scandal-waiting-to-be-discovered which dwarfs Teapot Dome?

7. The Departments of Interior and Justice, to the best of my knowledge, failed to disclose explicitly to the Supreme Court of the United States in the Andrus case that the Department of Interior had extensive evidence in its briefs that the Department's ruling in Freeman v. Summers in 1927 was erroneous with respect to the geologic structure of oil shale and was not in conformity with the economic rule that was stated in Castle v. Womble (1894). Despite this knowledge, the Department of Interior and Justice failed to Petition the Supreme Court for Rehearing on Andrus, even though professional staff urgently recommended such a Petition. How can the U.S. government be justified in continuing to use criteria for patenting pending claims which the Departments of Interior and Justice know are erroneous and stem from ex parte proceedings and political manipulations in 1927 in the Freeman v. Summers case? Should not the government take corrective action, by both the Secretary of Interior and the Congress, to stop patenting on the basis of Freeman v. Summers inasmuch as the Department earlier carefully documented that this key ruling was full of errors? (I hereby by reference include herein the excerpts from the DOI 1968 Brief I submitted for S. Hrg. 100-527, October 16, 1987, at pp. 194-242.)

8. The Departments of Interior and Justice failed to appeal the Tosco v. Hodel (1985) decision despite cogent staff work that showed that this decision was wrong on practically all its points. How did it come about that a "settlement" was reached by Reagan administration officials in 1968 which divested 82,000 acres of rich oil shale lands which contained a potential 42 billion barrels of recoverable oil? Who, if any one, protected the public interest in that divestiture? Did the Secretary of Interior properly discharge his trust responsibilities to the American people?

9. As described above, the Department of Interior repeatedly has fired, removed, or side-tracked career personnel for doing valid work to stop the oil shale land "giveaways." How can proper administration of valuable natural resources prevail in that Department if the political appointees of the Department repeatedly destroy the careers of professional staff who endeavor to do their best to have the Department administer the lands according to the laws which the Congress passed? I urge the Congress to investigate the Department's treatment of its employees who tried to uphold the laws relating to oil shale in the 1930's, 1960's, and 1980's.

10. The oil shale reserves in Colorado are one of the largest reserves in the world of potential recoverable oil, costly though it may be. These oil resources total somewhere between 1 to 2 trillion barrels. They are a national heritage. The resources in the 250,000 acres which the Department of Interior would dispose for $2.50 an acre could well be in the order of 100 billion barrels. Such huge

resources affect all Americans, not just the few who live on the western slope of Colorado. Is it proper and fitting that three members of the Congress from Colorado and some State and local officials in Colorado should be negotiating with claimants over a relatively narrow set of issues relating to the disposal of the 250,000 acres when the outcome is of concern to all the people in the United States? Should not oil shale policy be set in a national forum rather than in meetings in Colorado to which the general public was not invited.

11. The U.S. budget has huge deficits and the budget of the State of Colorado is likewise strapped for money. The need for public resources is virtually perpetual. On what basis can the staff members of Congressmen from Colorado and the Governor of the State of Colorado or his agents be carrying on negotiations in a forum at which hardly a voice is raised over the possible divestiture of huge Federal energy resources? If such public policy negotiations are to be carried on, should they not be done with wide advance public notice in an objective and wide open public forum which enables people from other States, including citizens from Colorado, to have an effective voice -- and be done on the basis of data which present the full implications of proposed divestitures to the American people?

12. In natural resource literature the Secretary of Interior is often described as the trustee for the U.S. public domain. Likewise, I view the Governor of the State of Colorado as the trustee for Colorado people of the potential large income which oil shale land in Colorado might someday yield to the State Treasury if the shale were continued in Federal ownership. Given the history of oil shale in Colorado, particularly the 1986 divestiture of 82,000 acres, have these officials been properly discharging their public trusteeship responsibilities? What should be done to ascertain whether they did, and to make sure that they do so in the future?

13. As the figures cited above show, the "claim owners" of pending oil shale claims would acquire potential oil shale resource wealth of more than $1 million for every $1 that they pay the Federal government for the claims. The people who succeed in securing patents based on claims that are more than 69 years old will become instant millionaires -- and their service to the public interest is of a very doubtful and uncertain nature. How much personal enrichment in this field is the U.S. government willing to tolerate at the expense of the taxpaying public?

14. Why has the Department of Interior neglected a large array of well-grounded charges that it could have levied against pending claims in contests to ascertain their true validity under the U.S. mining Law? In my statement to your Subcommittee, which the Senate finally published in its October 16, 1987 S. Hrg. 100-527 at pp. 265-266, I listed more than 15 such criteria, beyond the discovery and maintenance of claims criteria, which the Department of Interior has used or should use. The criteria include:

- Loss of discovery due to changing economic circumstances, as when the price of oil in the 1930's was less than $1 a barrel and oil shale claims became worthless for practical mining purposes for at least a decade.
- Improper or fraudulent location of claims (e.g., in deep snow, without stakes.)
- Use of dummy co-locators.
- Location for non-mining purposes, e.g., for speculation, grazing, etc.
- Failure to perform annual assessment work of $100 on each claim -- and to fully document it.
- Failure to do $500 of improvements on each claim.

- Adverse possession of the land by government, e.g., for grazing leases, oil drilling, hunting, etc.

- Oil shale is a non-metallic mineral of widespread occurrence. All the 430,000 acres already patented containing it cannot be simultaneously or proximately developed, so pending claims should be treated according to the restrictive discovery rules formerly applicable to sand and gravel mining claims (marketability at a profit).

- Failure to develop claim for mining within a reasonable time.

- Abandonment of claim (as among other indicia, acquisition under quit-claim deed for nominal consideration, and use of assessment work procedures under 30 U.S.C. 28 to forfeit out original co-owners). Deception of original locators or misuse of forfeiture procedures to deny them due notice should also be considered. Failure to do assessment work in past years and failure to answer charges in contest complaints in the 1920's and 1930's are good evidence.

- Issuance of conflicting patents and/or conflicting claims located for metalliferous minerals in late 1965 through early 1967.

- Land in the claim is non-mineral in character. Non-mineral land of 10 acres or more on claim.

- Claim not valid and subsisting on February 25, 1920 -- and continuously since then.

- Land not chiefly valuable for oil shale.

- Fraud in location or application for patent.

- Contravenes or denies established or higher public use of land (e.g., for coal classification or withdrawals antedating the claims or other purposes) under guise of a mining claim.

- Failure to meet affirmative standards for a productive venture to produce oil commercially in 69 years of claims.

- Lack from February 25, 1920, of foreseeable economic prospects for future profitable commercial oil production from shale within a reasonable period, e.g., 20 years.

- Claim previously investigated and declared null and void by Interior Department by "old decisions" for failure to do assessment work and other reasons.

The Congress should enact these criteria for determining validity of pending oil shale claims and stipulate that the Department of Interior must use them where applicable, in determining validity. The Congress should also give the Department adequate time for determining validity of pending claims so that required full field investigations can be made and contests can be prepared and conducted.

15. Huge wealth is involved in oil shale claims. Should not claimants be required to submit full documentation in support of claims and be required to do so under oath, subject to the same sort of penalties as we are required to face when we submit even the smallest tax return to the I.R.S.? The burden of proof should be on the claimants.

16. The development of oil shale will require much water and/or cause much air and land pollution. Studies from EPA more than a decade ago indicated that the production of oil from shale might require use of more energy than it produces. The threat of the global "Green House" effect due to excess carbon dioxide in the air raises a major question about the future of oil from oil shale. Should more public lands be turned over to private hands on the face of these environmental uncertainties about the feasibility of oil shale development?

17. The authors Tolchin have alerted America that foreigners have been buying American assets "on the cheap" with devalued dollars. If the Congress continues to allow Interior to "privatize" the public oil shale, we can look forward to having Colorado oil shale bought by the Japanese to provide oil for the factories of Japan -- while the environment in Colorado is desecrated by pollution from mining and extracting the oil. How do oil shale resources fit into our energy picture for national security purposes? The Congress should proscribe sale of oil shale rights to foreign-owned companies or foreign governments.

Recommendations to the Congress.

To protect the public interest properly and also to do justice to the claimants who still have pending oil shale claims located before February 25, 1920, I suggest the following actions by the Congress:

1. Embargo further patenting of pending oil shale claims including those that were in the pipeline on January 24, 1989.

2. Direct the Secretary of Interior to complete a full investigation of the geologic and economic validity of the criteria established in Freeman v. Summers and in Andrus, to identify the full array of other criteria applicable to proper determination of the validity of claims -- and to take necessary legal and administrative action to bring the criteria for patenting of oil shale claims in line with those that are used for other minerals and in line with geological facts and proper economic criteria. Then the Congress should enact the criteria.

3. Order the new Secretary of Interior to investigate the 1986 settlement and the disposals of the 82,000 acres of oil shale lands for propriety, validity, proper procedure, and adequacy of discharge of the Secretary of Interior's trusteeship responsibilities as public guardian of the U.S. government's public domain lands. Require the Secretary, based on such full investigation, to report to the Congress within one year its findings and proposed corrective actions that are needed to recover any lands that might have been improperly divested from public ownership.

4. Direct the Secretary of Interior to make a study and report to the Congress what it would require for the government to "buy out" all pending oil shale claims by reimbursing claimants for their prior development and other actual costs.

5. Congress should take action to authorize a full oversight investigation of Interior Department management and disposals of oil shale lands since 1920, including particularly the disposals in 1986-1987. This review should be done with the assistance of the General Accounting Office and should cover the scope which I carefully outlined for the Senate Subcommittee on Mineral Resources Development and Production in their Hearing record of October 16, 1987 (S. Hrg. 100-527 at pp. 191-192). I include those points in this Statement by reference. Such a review would clearly be in the public interest. The people of the U.S. deserve to know factually how their oil shale lands were mismanaged; on what basis disposals were made and who got them in the end; and whether such disposals were in accordance with the law and serve the public interest.

The roots of the oil shale land mismanagement go back to the Teapot Dome era in the 1920's.

There was a national furor over the oil leases in the Teapot Dome lands by Interior -- and it turned out that the Secretary of Interior, Albert Fall, had taken bribes.

The oil shale land disposals from 1920 through 1988 were sanctioned by Interior officials. They entailed Federal resource disposals and enrichment of successful claimants on a scale which makes the Teapot Dome amounts look tiny. The 1986 "settlement" which was made by Interior and Justice without carrying the government's case to the appellate Courts appears highly questionable. The county does not know how these disposals happened, on what authority they were based, why they happened, and who was really responsible?

Given the huge oil shale disposals still pending, the Congress has a duty to investigate the validity of past and pending oil shale land disposals in view of the documented statements in official, professionally-prepared Interior briefs that applicable laws had been widely disregarded. There is also widespread public and editorial skepticism about the oil shale land disposals at $2.50 an acre -- and even at $2,000 an acre. To enact new bills which perpetuate the disposal process under one guise or another is utterly unsound public policy.

Before it allows any further disposal of oil shale the Congress should therefore thoroughly investigate the oil shale situation and determine in what ways laws might have been disregarded or violated, and how much in public oil shale lands and resources might have been lost as a result. The Congress should also diagnose what caused the breakdown in public policy and public management which the Interior briefs have described.

Attachments:

Denver Post clippings, 7/16/88 and 12/13/88
Rocky Mountain News clipping, 7/17/87
Interior staff memo of 6/16/80 urging Petition for Rehearing in Andrus v. Shell.

8/10/89
(303) 494-4871

THE DENVER POST Saturday, July 16, 1988

Oil shale claims deal near accord

Denver Post Wire Services

RIFLE — Oil shale claimants angry at 60 years of government stalling and two Colorado Democrats bent on protecting public access to the Piceance Basin reached an agreement of sorts on oil shale claims Thursday.

They agreed to form a committee, under the auspices of the Associated Governments of Northwest Colorado, to attempt to seek a compromise that could be introduced in Congress.

Rep. Ben Nighthorse Campbell, D-Colo., and Sen. Tim Wirth, D-Colo., have introduced bills to convert the disputed oil shale claims, most of them dating back to World War I, into leases.

Campbell's bill passed the House last year, while Sen. Bill Armstrong, R-Colo., concerned over the property rights of the shale claimants, has Wirth's bill bottled up in the Senate.

Wirth and Campbell want to prevent another round of patenting by the Interior Department under which 82,000 acres of oil shale lands were deeded to claimholders in 1986 for a filing fee of $2.50 per acre.

Claim sold to Shell

One of the largest claimholders to patent claims was the Tell Ertl estate, which then turned around and sold 17,000 acres, acquired for $2.50 per acre, to Shell Oil Co. for $37 million.

That brought cries of speculation, a federal lands fire sale and the Campbell-Wirth legislation.

Joe Fox, attorney for the Ertl estate, said Thursday the estate still holds some property and has used the Shell sale as capital to invest in research in hopes of using oil shale to strengthen asphalt.

That project is ongoing in Rifle, and instead of "paying attorneys to fight the government, we're now paying people in Rifle to work out there," Fox said.

Campbell, Wirth and Armstrong were represented by aides Dan McAuliffe, Audrey Berry and Christine Kadlub, respectively.

They agreed with Rio Blanco Commissioner Peggy Rector, who chaired the meeting, to take part in a committee to seek a compromise.

Claimholders, the U.S. Bureau of Land Management, National Wildlife Federation and Colorado Department of Natural Resources are likely to have representatives named to the panel.

More than Saudi Arabia

At issue is the eventual disposition of an estimated 270,000 acres of oil shale lands in Colorado, Wyoming and Utah. They all are part of the Green River Formation, which is said to contain more oil than Saudi Arabia.

Under the 1872 Mining Law, prospectors can stake claims to minerals, do five years of assessment work, defined as spending $100 per year, and then file for a patent on their claim.

In 1920, Congress passed the Minerals Leasing Act, which shifted a number of minerals, including coal, oil and oil shale, into a leasing category, not claims.

The claims at issue were staked before 1920.

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Tuesday, December 13, 1988 THE DENVER POST

Interior Dept. revives shale land 'giveaway'

By Gary Schmitz
Denver Post Washington Bureau

WASHINGTON — Barely a month before leaving office, the Reagan administration has resurrected a controversial program that gives oil shale lands in Colorado and Utah to energy companies and land speculators for just $2.50 an acre.

Congress imposed a moratorium on such transactions in 1987 after the Interior Department turned over 82,000 acres of federal shale lands in Colorado. Environmental groups and House and Senate Democrats assailed the massive property transfer as a "giveaway" of publicly owned resources.

But with the moratorium expired and repeated congressional attempts to adopt a permanent prohibition having failed, Interior's Bureau of Land Management says it will begin processing an additional 250,000 acres of claims scattered across the high plateaus and rugged canyons of western Colorado and eastern Utah.

"Congress has adjourned without enacting oil shale legislation, (and) the department feels compelled to carry out its duties," James Cason, assistant interior secretary for land and minerals management, wrote leaders on Capitol Hill.

Interior Department officials, defending their policy before several congressional inquiries, insisted the land transfers were supported by the 1872 Mining Law and a lengthy history of court rulings.

Ignacio Democratic Rep. Ben Nighthorse Campbell, whose district includes most of the shale lands at issue, questioned the Interior decision.

'This is typical coming from this administration," Campbell said. "Why do they have to push the deadline . . . the second the moratorium runs out. What's their hurry?"

Campbell vowed to reintroduce his legislation that would severely restrict future shale land transfers. In the meantime, he said he will "continue to put pressure on the department" to scrutinize claims carefully.

Federal law allows those who stake out mining claims to take title to surface lands, provided several tests are met, for a nominal filing fee of $2.50 per acre.

That legal process, known as "patenting a claim," holds firm for minerals like gold and silver. But

OIL SHALE PLAN

- **AFFECTS** 250,000 acres.
- **COST:** $2.50 per acre.
- **THERE ARE** 1,575 mining claims for oil shale; applications have been filed to take ownership of 334 of those claims.

Please see **SHALE** on 9-A

Interior Dept. to again process oil shale claims

SHALE from Page 1-A

claims to oil shale, which never has been successfully developed on a commercial basis, have been subject to sometimes conflicting court interpretations.

Cason said the shale claims outstanding will be reviewed to determine whether a minimum amount of work has been done at the site and other legal requirements have been fulfilled. Title to those claims found to be valid will be granted "expeditiously."

BLM spokeswoman Carol MacDonald on Monday denied administration officials were rushing to put federal land in private hands before relinquishing power in January.

"The feeling is that it's time to march on with these claims," MacDonald said. "Some of these have been up in the air for a number of years."

According to the Interior Department, there are 1,575 mining claims for oil shale. Applications have been filed to take ownership of 334 of those claims. It will not be known how much acreage will go to private ownership until background checks are completed, BLM officials say.

Sen. John Melcher, chairman of the Senate Mineral Resources Subcommittee, said he had not studied the latest Interior decision and could not comment.

State/Region

Oil shale move may cost U.S. $210 billion

By JOAN LOWY
Rocky Mountain News Washington Bureau
© Denver Publishing Co. 1987

WASHINGTON — A decision by the Interior Department last year to turn over 82,000 acres of Colorado oil shale land to private claimants could cost the federal government an estimated $210 billion in royalties if the shale industry is revived, according to a congressional study obtained by the *Rocky Mountain News*.

The study, conducted by the investigations staff of the House appropriations committee, concluded the decision amounts to a tremendous tax advantage for the private owners — mostly large oil companies — if the dormant shale industry starts up again.

"The department has abrogated its trust responsibility by placing natural resources in the hands of industry without demanding just compensation," the staff's report concluded.

The study estimates there are 77 billion barrels of shale oil in the land, about 55% of which are potentially recoverable. If the federal government had retained ownership of the lands and leased them to oil companies while charging a 12.5% production royalty, the earnings to the government could amount to $210 billion.

An Interior Department spokesman declined to comment, saying he hadn't seen a copy of the report.

During the oil crises of the 1970s when prices skyrocketed, considerable effort was made to develop oil shale, particularly on the Western Slope of Colorado. Currently, all production of shale oil in the United States has ceased.

Despite the expenditure of hundreds of millions of dollars, oil companies have never been able to produce shale oil at a price competitive with crude oil in commercial quantities.

Much of the country's prime oil shale land is federally owned. Last summer, the Interior Department decided not to appeal a decision by a federal judge in Denver directing the government to turn over ownership of 82,000 acres to private claimants for a filing fee of $2.50 per acre.

U.S. District Court Judge Sherman Finesilver based his decision on an 1872 mining law that allows the holders of oil shale claims made prior to 1920 to receive title to the land for the $2.50 an acre filing fee if they have performed $100 worth of mining work each year on the land.

The claimholders are mostly large oil companies who obtained the claims from previous holders who sold them or forfeited their rights.

The Interior Department's decision to settle the case by turning over ownership of the land was made over the objections of its lawyers in Denver, who argued Finesilver's decision was greatly flawed. If allowed to stand, the Finesilver decision could be applied to up to 260,000 acres of federally-owned oil shale lands in Colorado, Wyoming and Utah.

Since settling the case, the department turned over ownership of almost all of the 82,000 acres and has begun to apply Finesilver's decision to another 11,000 acres.

As a result of the decision, the cost of producing shale oil by the major companies involved has effectively been reduced by billions of dollars if and when the oil shale industry is revived, the study found.

The study also determined that "no economic analysis was ever performed to assess the potential loss of revenues" as a result of settling the case.

The study was completed in February but hasn't been made public.

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OFFICE OF THE SOLICITOR
DENVER REGION
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225

June 16, 1980

Memorandum

To: Solicitor

From: Acting Regional Solicitor, Rocky Mountain Region

Subject: Petition for Rehearing--Andrus v. Shell Oil Company, et al., _____ U.S. _____, 48 LW 4603, June 12, 1980

In the subject case, the Supreme Court held that the "present marketability" feature of the test for determining whether a discovery exists on a mining claim cannot be applied to such a claim located for oil shale. It held Congress had carved out a "prospectively valuable" test for oil shale prior to 1920; that Congress, in passing the Mineral Leasing Act of that year, adopted this less stringent standard; and that the subsequent promulgation by the Department of its Freeman v. Summers decision together with certain congressional hearings confirmed this lesser standard for oil shale. We believe the Court's decision overlooks or misapprehends important facts and points of law. We strongly suggest that a Petition for a Rehearing should be filed.

As the dissenting opinion points out, the majority opinion reflects a misapprehension of the law of discovery as established in 1920. The relaxed "prospectively valuable" standard to which the majority refers applied only in cases involving disputes between rival or adverse mining claimants and not to disputes between the United States and a mining claimant. As the court pointed out in Book v. Justice Min. Co., 58 F. 106, 124 (D.C. Nev. 1893):

> It must be remembered that this is not a controversy between miners, upon one side, and agricultural claimants, on the other, to determine whether the land on Justice hill is more valuable for one purpose than the other; but it is a controversy between miners, to determine which has the title to certain land claimed by both parties as mineral land, and to have the title thereto quieted by decree of this court.

Thus, in Western Standard Uranium Company v. Thurston, 355 P.2d 377, 383 (Wyo. 1960), the Wyoming Supreme Court observed:

> It is also to be borne in mind that in cases involving the question of the validity of discovery as between rival claimants, as locators claiming under the mineral laws, decisions exhibit a marked liberality in sustaining a finding of discovery. This view has been expressed by the United States Supreme Court in the case of Chrisman v. Miller, 197 U.S. 313 . . . .

In this regard, Judge Lindley flatly declared:

> The value of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. [2 Lindley on Mines, Section 336, at 773 (3rd edition 1914).]

On the other hand, by 1920, the liberal, "prospectively valuable", test illustrated by Book v. Justice, had been rejected in situations where a mining claimant had to prove the validity of his claim to the United States.

As early as 1894, the Department had expressed the view that a discovery exists

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. [Castle v. Womble, 19 L.D. 455, 457 (1894).]

Often overlooked is the follow-on statement in Castle v. Womble at page 457, which provides:

> In other words, it may be said that the requirement relating to discovery refers to present facts, and not to the probabilities of the future. [Emphasis added.]

This approach to the test of discovery had been expressly affirmed by the Supreme Court by 1920. See, for example, Chrisman v. Miller, 197 U.S. 313 (1905). In the decision Cole v. Ralph, 252 U.S. 286 (1920), the Supreme Court stated:

> The defendant testified that no oil was ever mined upon any of the lode claims, and that "there was no mineral exposed to the best of my [his] knowledge which would stand the cost of mining, transportation, and reduction at commercial profit." In the circumstances this tended to discredit the asserted discovery; and of like tendency was . . . his further statement, referring to vein material particularly relied upon as a discovery, that he "would hate to try to mine it and ship it." [p. 299]

Thus, the Court clearly understood the requirement of present marketability. The Cole case was decided on March 15, 1920, less than three weeks after the enactment of the Mineral Leasing Act of February 25, 1920.

As the dissenting opinion also points out, the Department, prior to 1920, had not taken the position that an oil shale claim could be patented upon a showing of prospective value. In fact, the question of whether an oil shale claim could be patented at all was not raised until approximately two months after the passage of the Mineral Leasing Act. On April 10, 1920, the General Land Office inquired of the Secretary whether oil shale could be patented. Instructions, 47 L.D. 548 (1920). The First Assistant Secretary replied that oil shale could be patented upon the same basis as oil and gas under the Oil Placer Act, the Act of February 11, 1897, 29 Stat. 526. The Department optimistically assumed that some of the operations then existing would soon be commercially successful. However, in its 1920 opinion, the Department never suggested a different standard for patenting oil shale claims. It expressly incorporated the standards applicable to oil and gas, and the Department's views were that oil and gas deposits had to be commercially valuable for the claims to be patented.

> [O]il or gas in commercial quantities must have been produced, or it must lead to the conclusion that, from the discovery made, it can be produced in commercial quantities on the claim in question. Oregon Basin Oil and Gas Company, 50 L.D. 244 (1923), aff'd Oregon Basin Oil and Gas Company v. Work, 6 F.2d 676 (D.C. Cir. 1925), aff'd 273 U.S. 660 (1927).

Accordingly, when Mr. Sinott stated "we are in line with the decisions of the courts as to what is a discovery . . .", 58 Cong. Rec. 7537 (1919), those decisions very clearly required a mining claimant to demonstrate that he had discovered on his claim a valuable mineral deposit with present, as opposed to a prospective, value.

It was not until 1927 that the Department held for the first time that marketability at some future date, under better economic conditions, was sufficient to satisfy the discovery requirements of the mining law. That conclusion was reached in the now famous case of Freeman v. Summers, 52 L.D. 201 (1927). That decision was written by First Assistant Secretary E. C. Finney after the Department's chief legal officer, the Solicitor, and every member of the Solicitor's Office had refused to write it in the manner desired by Mr. Finney.

Without being injudicious in characterizing the circumstances that resulted in Freeman v. Summers, an objective analysis of the facts would not fail to conclude that it represents one of the saddest commentaries upon the administration of the public lands -- an infamous holding based upon a cavalier disregard of the public trust and the public's interest in potential synthetic oil reserves of billions of barrels -- now of a potential value of trillions of dollars -- and with the Supreme Court's imprimatur placed upon that decision, a gift to the oil companies now owning these pre-1920 located oil shale claims at a nominal purchase price of $2.50 an acre.[1/]

1/ The area of the six placer oil shale claims involved in the Court's opinion contain a continuous seam of 30-gallon per ton oil shale in the Mahogany Zone of about 46 feet. At 2,000 barrels per acre-foot, commonly used for estimation purposes, each of the six 160-acre claims contains 14.7 million

The facts upon which this conclusion is based are fully discussed in the enclosed section KK from volume 5 of the Government's posthearing brief in the initial administrative contests which led to the Supreme Court's decision.

Also enclosed is a portion of the Government's appeal brief dated June 12, 1970 in the administrative contest, which resulted in an IBLA decision that overruled Freeman v. Summers. It demonstrates the utter fallacies of Freeman v. Summers and supports the proposition that the Department had the authority to overrule this erroneous, outrageous decision of 1927. Refer particularly to page 30 of the appeal brief which cites statistics of the past revocation, vacation, overruling, and modification by the Secretary of prior decisions. The brief further demonstrates the errors of fact, of law, and the irregularities found in Freeman v. Summers. Further, we call your attention to the section entitled, "Decisions Citing Freeman v. Summers" on page 34 which covers decisions subsequent to Freeman v. Summers and which, when analyzed, constitute at least an implied overruling of Freeman v. Summers, specifically as to oil shale.

We feel that properly presented, these points can be shown to constitute matters which the Supreme Court did not fully consider and that when so considered, should cause the

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1/ cont'd

barrels of shale oil. The total six claims contain 88.3 million barrels. At the present world price (Saudi Arabia) of $28 a barrel less $3.00 refining penalty, or $25.00 a barrel net, the gross value of the reserves in the six claims is about $2.2 billion. The purchase price to obtain a patent by Shell Oil Co. and D. A. Shale Co. to the six claims would be $2.50 an acre, or $2,400, compared to a gross potential reserve value of $2.2 billion. The monumental unprecedented potential boon the Supreme Court opinion provides the oil companies which own the thousands of unpatented oil shale claims in Colorado fractures imagination. Ironically, however, there still is no evidence oil shale claims will ever be developed, because of excessive investment costs and the negative energy input-output ratio to develop oil shale. And so the underlying purpose of the mining laws, to see that minerals are developed, is not advanced by the Supreme Court's opinion, but places these undeveloped reserves in the hands of oil companies so that the public and the several States will never have the prospect of benefiting from lease royalties.

Court to disassociate itself from the ill-conceived holding in Freeman v. Summers.

We believe the Court, in a Motion for Reconsideration, should be made aware of a critical fact regarding certain 1930 congressional hearings apparently overlooked by the majority in the Shell case. The Court places great emphasis on the impact of those hearings. The majority concludes the hearings placed the imprimatur of Congress on the prospectively valuable test expressed in Freeman v. Summers. The record shows, however, that the correctness of the Freeman v. Summers decision was not the concern of the subcommittee conducting the hearing.

The subcommittee was headed by Senator Thomas Walsh of Montana. He noted at the beginning of the hearings that he wasn't concerned over the correctness of the Department's decision but, rather, how it had been reached:

> Senator Walsh: Let me remind you in this connection, before we go further, that it is a matter of very little consequence, as I take it, to this committee, as to whether a correct conclusion in any particular case was arrived at or not arrived at. We are more particularly concerned about how it came about that the Department changed its view about the matter.

This quote is found in the Government's Exhibit 729 at page 27.

That the manner of change continued to occupy Senator Walsh's attention for the rest of the hearings is evidenced by comments made during the hearings. (For example, see pages 54, 128, 139, 140, and 141, of the above-identified exhibit.)

The majority opinion concludes that a letter from Senator Nye to the Secretary of the Interior formalized the congressional committee's approval of the Freeman v. Summers "prospectively valuable" test. This conclusion overlooks the focus of the hearings, which were concerned about procedures and not legal principles. Moreover, the advice of Senator Nye was not to process the pending applications under the doctrines announced in Freeman v. Summers but simply to process them "in conformity with the law", whatever the proper and applicable law was.

Finally, we believe a Motion for Reconsideration should be filed because the prospectively valuable test invoked by the majority is so vague as to give the Department virtually no guidance with respect to the processing of oil shale mining claim patent applications. By what set of standards does one determine that an oil shale deposit is "prospectively valuable"? How far into the future may one project to conclude that a particular deposit of oil shale has prospective value? This is a real consideration because some of the deposits which may have been considered to be prospectively valuable in 1920 may not be considered to be "prospectively valuable" at this time. May one apply "hindsight" to determine what might have been "prospectively valuable" in 1920?

To emphasize our concern with regard to the definition of "prospectively valuable", in 1970 the Supreme Court held that a mining claim could be invalidated where there had not been "substantial compliance with the assessment work requirements of the 1872 Act . . . ." Hickel v. Oil Shale Corp., 400 U.S. 48, 57 (1970). Ten years of almost continuous litigation since that time have not produced a final definition of "substantial compliance." At least that much time will be consumed by litigation before an acceptable definition of "prospectively valuable" is developed unless the Court is willing at this time to give that term further consideration and elaboration.

In conclusion, we wish to call your attention to Rule 58 of the Supreme Court Rules, which allows 25 days to file a Petition for Rehearing with the Supreme Court, making the filing deadline June 27, 1980. The petition must briefly and distinctly state the grounds and must be supported by a certificate of counsel to the effect that the petition is presented in good faith and not for delay.

Albert V. Witham
Acting Regional Solicitor
Rocky Mountain Region

Enclosure

LLMadsen:AVWitham:zs

August 12, 1989

Honorable Jeff Bingaman
Chairman, Senate Subcommittee on Mineral
Resources, Development and Production
of the Senate Committee on Energy and
Natural Resources
U.S. Senate
Washington, D.C. 20510 Room 364 Dirksen

Dear Chairman Bingaman:

With reference to the Oil Shale Hearing held on July 31, 1989 before the Senate Subcommittee on Mineral Resources, Development and Production of the Senate Committee on Energy and Natural Resources pertaining to S.30 and H.R. 2392 (both of the 101 Congress, 1st session), I respectfully request that this letter together with the attached following documents be accepted as my Statement and be printed in the record of the July 31, 1989 Oil Shale Hearing:

(1) Copy of my letter dated February 27, 1989 addressed to Honorable Nick Joe Rahall, Chairman, House Subcommittee on Mining and Natural Resources, together with a copy of my Statement and copies of all attachments thereto, prepared and sent to Chairman Rahall by me for the Oil Shale Hearing held by said House Subcommittee on February 28, 1989; and

(2) Copy of my letter dated August 11, 1989, addressed to Honorable John Glenn, Chairman, Senate Governmental Affairs Committee, together with copies of attachments thereto; and

(3) Copy of letter (10 page) dated August 25, 1987 addressed to Honorable J. Bennett Johnston, Chairman, Senate Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C. 20510, from Douglas Robotham, then Chapter Staff person, Sierra Club, Rocky Mountain Chapter, Denver, Colorado 80206. (I was told by various Sierra Club members that Chairman J. Bennett Johnson never responded to said letter. No other Senators who were sent copies of the said letter apparently ever responded to the letter. I generally concur with the trust and sweep of the above said letter and that the matters raised in the letter are significant and must be squarely faced by your Subcommittee members. It can be said that much of the information contained in the letter was obtained by one or more members of the Sierra Club from me.)

My views and positions with regard to S.30 and H.R. 2392 are made known in the documents identified in items (1) and (2) above.

Additionally, anyone interested in my positions and views in regard to matters involving oil shale land administration and disposals thereof by the U.S. Government should carefully read pages 265-290 in S. Hrg. 100-744 (1988). Relevant information also is reflected in pages 291-307 in S. Hrg. 100-744. Further relevant information is reflected on pages 185-286 in S. Hrg. 100-527 (1987). The above noted Hearing documents reflect oil shale hearings before the Subcommittee which you now head, held on October 16, 1987 and on April 22, 1988.

Based on the analysis set out in the above enclosed materials and on the content of the information (and in the documents, including legal briefs, referred to in said information), reflected on pages noted above in S. Hrg. 100-527 and in S. Hrg. 100-744, and further on the basis of my own experience and knowledge of matters involving pre-1920 oil shale mining claims, I respectively recommend that neither H.R. 2392 nor S.30 be enacted into law by the U.S. Congress.

Heretofore, I submitted to Counsel Patricia Beneke, copies of certain legal briefs (3 or 4 in number prepared by me in 1962 and 1963) relating to various legal issues involving pre-1920 shale claims. I respectfully request that said legal briefs be inserted into the record of your Hearing held on July 31, 1989 mentioned above. If the copies of the briefs cannot be located, please let me know and I will supply to you the copies of the four briefs. Please insert the briefs into the records in sequence of their dates.

In conclusion, I specifically respectfully request that you and the members of your Subcommittee carefully study the recommendations I outlined with regard to oil shale matters in my letter dated April 6, 1989 addressed to Senate Majority Leader George Mitchell. A copy of said letter is attached to the copy of letter dated August 11, 1989 addressed to Chairman John Glenn noted in item (2) above.

I highly endorse the recommendations I made in the April 6, 1989 letter to Majority Leader Mitchell, to your Subcommittee as the proper course of action to be carried out in the Senate on oil shale claim matters.

Respectfully,

Fred S. March

Fred S. March

Enclosures are as noted in the letter.

Temporarily at:
P.O. Box 285
Erie, Colorado 80516

Permanent at:
P.O. Box 742
Ocean Shores, WA 98569

Copies of this letter without enclosures are being sent to:
Senate Majority Leader George Mitchell
Chairman John Glenn
Chairman Patrick Leahy
Honorable Brock Adams
Honorable Slade Gorton

February 27, 1989

The Honorable Nick Joe Rahall
Chairman
Subcommittee on Mining and Natural Resources
of the House of Representatives Committee
on Interior and Insular Affairs
HI-819
House of Representatives
Washington, D.C. 20515

Dear Chairman Rahall:

I respectfully request that this letter together with my enclosed Statement and the attachments thereto, be inserted into the printed Record of your Oil Shale Hearing of February 28, 1989.

In April 1988 I submitted a letter to Chairman Melcher, together with attachments thereto. These documents are in S. Hrg. 100-744, at pages 265-290. I urge you and other members of your Subcommittee to review them in connection with my enclosed Statement.

Mr. William Shafer has copies of my four briefs prepared in 1962-1963. These briefs, I request, be inserted into the Record of the Subcommittee's Hearing of February 28, 1989 directly after my letter and Statement. The briefs should be arranged in order of their dates in the record.

Respectfully,

Fred S. March

Fred S. March
(303) 828-3976

Enclosures: 4 sets

Temporarily at
P.O. Box 285
Erie, Colorado 80516

Permanent at
P.O. Box 742
Ocean Shores, WA 98569

Statement on

The Department of Interior's Proposal to Resume Patenting of Oil Shale Claims and on Related Bills H.R. 643 and S. 30, 101st Congress, for the House Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, U.S. House of Representatives, in connection with the hearing scheduled for February 28, 1989.

By Fred S. March, Former Interior Department Attorney

In a December 6, 1988 letter to then Chairman John Melcher of the Senate Subcommittee on Mineral Resources, Development, and Production, James Cason, Deputy Assistant Secretary for Land and Minerals Management, informed Congress of DOI's intention to resume the processing of oil shale claims to patent. In this letter and in the 12/07/88 memo to State Directors from A. A. Sokoloski, the Department described the rationale for the action and the criteria under which claims would be adjudicated. The following paragraphs outline ways in which this rationale may be legally and logically deficient.

Based on our examination of the content of these above documents, copies of which are attached, we conclude that pre-1920 unpatented oil shale mining claims will be permitted to go to patent by the DOI and BLM essentially in disregard of requirements of law and/or through a misapplication of purported case precedents to such mining claims, if Interior's plan is carried out.

Before getting into the substantive requirements of law as to the validity or invalidity of oil shale mining claims, it is necessary to raise the question whether DOI's plan as set forth in Cason's letter to patent pending mining claims requires compliance by DOI with provisions contained in the National Environmental Policy Act and in the Federal Land Policy and Management Act. The procedural requirements of these two Acts should be carefully explored to determine whether any entity would have standing to base a suit in the appropriate Federal Court to stall DOI's plans for further patenting.

We believe that some person or organization should consider opening negotiations with the State of Colorado through the Governor's Office, the Office of the Attorney General, and the Director of the Natural Resources Department, for the purpose of motivating/encouraging the State to consider whether the State should bring a suit against the U.S. in the Supreme Court to enjoin DOI from carrying out its plan for further processing by DOI of claims to patent. The suit can be premised on the failure of DOI to comply with requirements of applicable Federal laws, both procedural and substantive and on grounds that Interior's plan, if carried out, will operate to violate laws applicable to pre-1920 oil shale unpatented mining claims and lead to illegal disposals of Federal oil shale lands under the guise of purported pre-1920 oil shale mining claims.

It is not the purpose of this paper to recapitulate all substantive requirements of the U.S. Mining Law as amended by the Oil Placer Act of 1897 (29 STAT. 526) and by the Mineral Leasing Act of 1920, but we stress that knowledge of the content of DOI decisions reflected in the L.D.'s, the I.D.'s, and IBLA's (also reflected in the I.D.'s) is very helpful. These decisions construe the requirements of the above laws applicable to oil shale mining claims and are available in the Regional Solicitor's Office of DOI in Denver and certainly at the CU Law School Library. Also it is pertinent to be aware of a number of Federal Court decisions that are also applicable to to unpatented oil shale mining even though decisions involved claims other than oil shale claims. However, care should be taken not to misapply a holding of a court decision to certain DOI claims unless the facts applicable to each unpatented claim "stand on all fours" with the facts determined to exist with reference to the claims in the court decision. It is a fundamental rule recognized by the DOI and the Courts that the validity or invalidity of a claim must be decided on the claim's own facts and merits. See 51 L.D. 141; 52 L.D. 201; and 63 I.D. 341; and 65 I.D. 336.

Consideration should also be given by a reviewer to the fact that in earlier oil shale mining contests conducted by the General Land Office and later by the Bureau of Land Management, all applicable charges were not used in oil shale mining claim contests, which failure inured to the benefit of the claimants and to the detriment of the United States and to the detriment of the State in which the claims were situated. Thus the history and facts relevant to the claim or claims were often not developed in the transcript of the record and in the record of the administrative contest proceedings. This often operated to keep facts away from the Courts which were involved in the judicial review of final Interior Department decisions.

Accordingly, even U.S. Supreme Court decisions would not serve as proper precedents as to other unpatented oil shale mining claims where an incomplete record on the claim or claims reaching the Supreme Court was made in the Courts below and in the administrative contest proceedings conducted in the Department of the Interior. For instance, GLO in the 1920's should have contested claims on all available charges, such as abandonment, but did not do so. Likewise, even in Contests 359 and 360, apparently initiated in 1964, referred to below, all available charges were not used by BLM in its complaints in said contests. Thus, Andrus v. Shell Oil Co., 446 U.S. 657 (1980), involving some of the claims in Contests 359 and 360, referred to below, in our view, should not be used by Interior as reliable precedent in the Department of the Interior and the BLM as a basis for not determining the validity or invalidity of remaining unpatented mining claims on all available charges, including charges of lack of discovery and loss of discovery.

The standards for discovery set out in Cason's letter are not sufficient to properly determine the validity of claims. One must carefully review the legal briefs filed by the Regional Solicitor's Office, Denver, in U.S. v. Weber Oil Co. et al., Contest 193, 260, and in other contests to get a more complete set of criteria for validity of claims. These briefs are also available in the Regional Solicitor's Office and the BLM State Office in Denver. In addition, we believe that the content of the Draft Appeal Brief prepared by the Denver Regional Solicitor's Office in the context of TOSCO v. Hodel should be carefully reviewed, for that brief indicates very clearly that Andrus should only be applied consistent with the fact that in Contests 359 and 360 some of the claims were apparently declared null and void for lack of discovery sufficient to meet the requirements of Freeman v. Summers decision, 52 LD 201 (1927).

Since apparently neither the government nor the contestees appealed the hearing examiner's decision which apparently declared null and void certain of the claims in Contests 359 and 360, the hearing examiner's decision became final and, in our opinion, should be treated as precedent upon which to declare a good many of the unpatented mining claims null and void for lack of a valid and timely discovery to satisfy applicable Federal law. The Subcommittee should obtain a copy of the

Hearing Examiner's decision on claims in Contests 359 and 360 and insert the decision into its Hearing Record for the hearing of February 28, 1989.

A copy of the Draft Appeal Brief pertaining to TOSCO v. Hodel, 611 Fed. Supp. 1130, U.S.D.C. Colorado, May 1, 1985, should be available upon request to the Chairman, House Interior and Insular Affairs Committee. This draft appeal brief should be reviewed with the contents of the 1600 page brief and appendixes filed by the Regional Solicitor's Office, USDI, Denver, in contests 359 and 360, referred to below together with the briefs in U.S. v. Weber Oil Co., et al., mentioned above.

Again with reference to the standards for discovery set forth in Cason's letter, it would appear that the proposed standards are probably the product of the erroneous TOSCO v. Hodel decision, the erroneous Freeman v. Summers decision, certain erroneous IBLA decisions, and the erroneous decision in Andrus v. Shell. The erroneous and inadequate nature of the standards proposed by Cason can be established by considering the following points:

(1). What was the purpose and effect of the provisions contained in the Oil Placer Act of 1897? Notwithstanding anything to the contrary in the majority opinion in Andrus, this Act opened up certain petroleum and mineral oil lands to location under the placer mining law provisions of the 1872 Act if the lands were "chiefly valuable therefor," at the time of location, and perhaps up to the date of the Mineral Leasing Act. We question whether the lands within each of the oil shale claims were "chiefly valuable" for oil shale at the dates of the location of each of the claims as such oil could not have been produced at a profit from each of the unpatented mining claims. (See Bay v. Oklahoma Southern Gas, Oil and Min. Co., 13 Okla, 425, 73 P. 936 [1903]).

According to the best information that we have been able to gather, the Oil Placer Act apparently is the product of H.R. 9985, which was reported by the House Committee on Public Lands without amendment, as reflected in House Report No. 2655 (January, 1897 44th Congress, 2nd session). We do not know whether the bill was passed by the House and Senate without amendment, however, the legislative history on this Act certainly is crucial for the purpose of giving insight as to how the Act should be applied to oil shale claims in light of the words "chiefly valuable therefor" in the Act.

We believe that these words meant that oil shale placer mining claims could only be located on lands "chiefly valuable" for oil shale at the date of location of each of the claims as specified in the Act and a claim for oil shale land might have to meet a higher discovery standard on February 25, 1920, the date of the withdrawal of oil shale deposits from further entry, under the Oil Placer Act, than generally required for other claims made under the 1872 Mining Law, for the claim to prevail over other possible competing uses for the land within the unpatented mining claims, such as for grazing, agriculture, recreation, hunting, fish and wildlife, timber value, if any, and cabin sites. The additional reason for this is that under the Mineral Leasing Act, the government becomes a beneficiary of, for example, bonuses, rentals and royalties, and accordingly, a claimant should have to show that his claim is valid by a stricter standard of proof. The standard of proof in this case should be "clear and unequivocal or convincing evidence" (from U.S. v. Dawson, 58 I.D. 670, 679 [1944] and H. H. Yard 38 L.D. 67 [1909] rather than a "preponderance of evidence" (see Foster v. Seaton, 271 F.2d 836 [1959]). Congress F Sm can enact into law a stricter standard of proof for a claimant to meet to establish the validity of pre-1920 unpatented oil shale mining claims. Accordingly, the true meaning and effect of the Oil Placer Act with respect to oil shale claims is a matter of high priority in determining how any organization or Congress must prepare itself to combat DOI's overtly erroneous plan for further oil shale disposals under the guise of alleged pre-1920 claims.

As far as we know, prior to the enactment of the Oil Placer Act there was no authority, under the U.S. Mining Laws, for location of placer mining claims for either oil shale or oil. The Oil Placer Act, however, was made applicable to any claims for petroleum or mineral oils allegedly located under the Placer Act provisions of the Mining Law prior to the date of February 11, 1897.

Of relevance to the application of the provisions of the 1897 Act, we submit that a DOI decision rendered in the case of U.S. v. Estate of Victor Hanny, 63 I.D. 369 (1956) (involving a claim covering a deposit of slate located in Arizona which was located under the provisions of the Building Stone Act of 1892, 27 Stat. 348; 30 U.S.C., Sect. 161, containing the language "chiefly valuable," i.e. chiefly valuable for building stone on the date of location of the claim) found that the deposit was a "commercial" one but since the slate from the claim could not be marketed for a profit, the claim was found lacking in a valid discovery. Of pertinence to the issue of discovery in the context of oil shale claims was the fact that the slate from the claim had not been marketed for many, many years. No evidence apparently for the BLM had been introduced in the contest record on this slate claim to show what uses the land was valuable for other than mining.

The DOI Instructions, promulgated May 10, 1920, 47 L.D. 548, pertaining to oil shale claims and the applicability of the Oil Placer Act to them makes it clear that oil shale claims would be handled in DOI in the same way as oil placer claims. Accordingly, decisions of the Department as to what constitutes a valid discovery of a valuable mineral deposit for an oil placer mining claim are also applicable to oil shale unpatented mining claims. In our view, in light of the provisions of the Oil Placer Act and the Instructions mentioned above, including the decision by the DOI in the "Slate Case," it is unlikely that there exists any oil shale claims that can satisfy the "chiefly valuable" requirement of the 1897 Act for each of the claims. This requirement so far has been totally overlooked in the DOI and in the Courts since the DOI issued its Instructions in 1920. The Instructions should be carefully studied to perceive their content with reference to the effect of the "chiefly valuable" requirement. In particular, the full significance of the phrase "chiefly valuable therefor" as set forth in the Oil Placer Act has been missed in DOI, the Courts, and in Congress as to pre-1920 oil shale unpatented mining claims.

(2). Is TOSCO v. Hodel in error on the facts and the law? Yes! The evidence for this assertion may be found in the Draft Appeal Brief mentioned above, the legal briefs filed by the Regional Solicitor's Office in U.S. v. Weber Oil, and in the legal briefs filed by the Regional Solicitor's Office in Contests 360 and 359, U.S. v. D.A. Shale and U.S. v. Winegar, et al., respectively, consisting of some 1600 pages, dated 1968. These briefs are hereby incorporated with this document by reference.

Your Subcommittee should request the Secretary of the Interior to provide copies of these mentioned briefs to the Committee for insertion into the record of the Hearings to be held on February 28, 1989.

The brief, filed in Contests 359 and 360, makes it quite clear that the DOI in issuing oil shale claims to patent seems to have followed standards (actually non-standards) similar to those proposed by Mr. Cason in his December 6, 1988 letter. In other words, DOI employees really never followed any standards in the 1940's and the early 1950's to really get down to the question of whether claims were valid. In effect, Cason's letter represents a return or retreat to the erroneous practices followed in the DOI which were severely criticized and exposed in the 1600 page brief and its appendices. See particularly pp. 357 and 358 and 366 of Vol. I of the Post Hearing Brief and Appendix for the Contestant in Contests 359 and 360.

Since the TOSCO v. Hodel decision has been vacated by the U.S. Circuit Court of Appeals, 10th Circuit, we do not agree with Mr. Sokoloski's conclusion that certain I.B.L.A. decisions (though not identified by him in the memo he signed on 12/07/88), were mooted by the Settlement Agreement of August 4, 1986 (which led to the disposal of approximately 82,000 acres of Federal oil shale lands subject to the terms of the agreement) for certainly the Settlement Agreement did not operate to overrule the I.B.L.A. decisions, which, notwithstanding anything to the contrary in the Settlement Agreement, may be used as a precedent until overruled by the Secretary, if applicable, to the proper handling of unpatented oil shale mining claims in the Interior Department.

(3). Is Freeman v. Summers in error as to facts and the law? Yes! This assertion is confirmed in the briefs referred to in (2) above, in which briefs the errors of this decision are exposed at length with solid documentation.

We believe that Freeman v. Summers certainly should not be used as a precedent in DOI in determining the validity or invalidity of as yet unpatented claims. The decision is totally inconsistent with the provisions of the Oil Placer Act, which Act is still applicable to oil shale claims, even though the Act was superceded for any new claims by the enactment of the Mineral Leasing Act. Freeman v. Summers erroneously determined and misdescribed the composition of the Green River formation and stated, in effect, that it was minable in its entirety from the top to the bottom of the formation, the lean beds and rich beds alike.

Mr. Ralph S. Kelley, then Chief, Field Division of GLO, Denver, and his two mining engineers, subsequent to the issuance of Freeman v. Summers, prepared a petition intended for the Secretary of the Interior (but which was held back by then First Assistant Secretary from the Secretary), setting forth and describing the correct composition of the Green River formation covered by the claims involved in Freeman v. Summers. Mr. Kelley exposed in the old New York World (early 1930's) in his oil shale series matters relating to Freeman v. Summers and its consequences, and other wrongdoing on oil shale matters in DOI and the Justice Department.

The Senate Public Lands Committee held hearings under Senate Resolution 379, 71st Congress, in 1931, but the Senate Committee failed to develop in the hearings the full body of mining law, including DOI and court decisions, applicable to oil shale claims and oil placer mining claims. By doing this, the Senate Committee members failed to determine whether Freeman v. Summers was correctly decided. The Senate Committee even failed to insert into the record of its Hearings the

Kelley articles and did not give him an opportunity to testify regarding the substance of his criticisms of DOI handling of oil shale lands. Freeman v. Summers notoriously failed to discuss the content of DOI's own Instructions of May 10, 1920, 47 L.D. 548, and the then recognized body of law of discovery applicable to oil placer mining claims.

Freeman v. Summers is so patently erroneous as to require Congress to overrule it by law, so that the DOI can no longer rely on this decision as a basis to give away oil shale lands, contrary to and in violation of law. Certainly, by no stretch of imagination can any Court properly hold that the decision modified, repealed, or amended the provisions of U.S. mining laws, the Oil Placer Act, and the Mineral Leasing Act. For a more thorough understanding of the case of Freeman v. Summers, see pp. A-1153 through A-1267 in Vol. 5 of the Post Hearing Brief and Appendix for the Contestant, Contests 359 and 360.

The standards of discovery for a valuable oil shale deposit for a claim as set forth on the first page of Cason's December 6, 1988 letter appear to be a modification on the standard formulated in Freeman v. Summers, which would have the effect of validating more claims.

The findings of fact concerning the nature of the Green River Formation in Freeman v. Summers appear to be as follows:

1). That it is a massive, homogeneous deposit consisting of single stratum or bed or some 2,700 feet from the rich mahogany beds to the surface.

2). That all of its stratigraphic column contained material that would yield oil upon destructive distillation.

3). That the whole body could be commercially developed and that shale found on the surface was an integral part of the mass below.

4). That a prospector could physically follow a mineral-bearing body from the top to the richer beds below.

Mining engineers and other experts in the employment of the BLM, Bureau of Mines, and U.S. Geological Survey, know or should know that the above four factual premises of the Freeman v. Summers decision were, in fact, erroneous as to the claims in the Freeman v. Summers decision. That decision should never have been applied by DOI to other unpatented mining claims.

In response to a lengthy memorandum from the Office of the Regional Solicitor, Denver, to the Solicitor, dated March 10, 1961, which reviewed oil shale problems facing the Regional Solicitor's Office, the BLM in Colorado, and the Department, and which memo outlined positions taken on these problems from the creation of the Regional Solicitor's Office in 1954 to March 10, 1961, then Solicitor Frank J. Barry stated in a memo dated June 1, 1961 to the Regional Solicitor in Denver, in part as follows:

"The Freeman v. Summers decision stands as Department precedent until it is overruled. However, in my view it is governing precedent only to the extent that the facts and geological data upon which it was decided in 1927 are the same as those upon which the cases presently before the Department are to be decided. We feel there can be no objection to putting the conclusion reached in Freeman v. Summers to the test of new or different facts, or new or more accurate geological data than was in the record when the case was considered. Certainly, if the Freeman case was decided on the basis of erroneous geological data, the conclusion there reached not only can but should be tested with correct data. It is noted that you have already attacked the Freeman v. Summers decision in the pending Contest No. 147 (Colorado), United States v. Savage, involving the Hoffman No. 11-14 oil shale mining claims. We have no objection to your doing so in any other case where justified by the particular facts or circumstances. In this manner, the Freeman v. Summers doctrine will undoubtedly be reviewed by the Department in the Savage case, or in other pending cases, and a determination eventually made as to whether it should be applied under the facts and circumstances set forth in the hearing record then before the Department."

In United States v. John W. Savage, BLM (Colorado) Contest 147 a trial-type hearing was held in 1960 and a record was made that should justify overruling the Freeman v. Summers decision. After the Hearing Examiner issued his decision in Contest 147, both sides appealed to the Director of BLM. It is believed that in the early part of 1963 the Regional Solicitor's Office, Denver, filed a brief with the office of the Director, BLM, Washington, D.C., urging that the Department to overrule Freeman v. Summers as the Department in that decision had made erroneous findings of fact as to the nature of the Green River Formation. It is also believed by some that in order to render Contest 147 moot and thereby deny the Department an opportunity and subject matter of a case in which to overrule the erroneous Freeman v. Summers, Mr. Savage quit-claimed the unpatented claims in the contest to the United States and then the BLM dismissed his appeal as the case became moot. The Secretary of the Interior, as well as Congressional Committees, should carefully study the entire record in Contest 147 to ascertain the facts in said contest record and the evidence the attorney for the United States put into the record in Contest 147 to prove the factual findings in Freeman v. Summers as to the nature of the Green River formation to be entirely in error.

The application of the "prudent man rule" for discovery to erroneous geologic "facts" as set forth in the Freeman v. Summers decision would seem to vitiate the precedent, if any, set by the decision in Freeman v. Summers, as being a mistake of law and fact resulting in a constructive fraud on the United States and the then homesteader. In this connection, for a reference to words, "resulting in constructive fraud", see Standard Oil Company of California v. United States, 107 F.2d 402, at 414 (1940).

In view of what has been said above on Freeman v. Summers, it would be manifestly unjust for the Department of Interior to apply an erroneous precedent, based on erroneous findings of fact as to the nature of the Green River Formation, to remaining unpatented oil shale mining claims to support the conclusion that a timely discovery was perfected on each of the unpatented claims and that there now exists a valid discovery of a valuable mineral deposit on each unpatented mining claim to satisfy the discovery requirement of the U.S. mining laws (as amended by the Oil Placer Act of 1897, 29 Stat. 526, and the provisions of the Mineral Leasing Act of February 25, 1920).

If each of the Federal courts considering Freeman v. Summers were directly put on notice of erroneous geologic findings as to the nature of the Green River Formation in Freeman v. Summers, decisions by the Federal judiciary which breathe life back into the erroneous Freeman v. Summers decision, might be deemed to perpetrate a fraud upon the United States.

In light of the above, it would seem appropriate for the Secretary of the Interior, on his own motion to exercise supervisory authority based on the records made in Contests 359 and 360, Contest 147 and in the record made in the administrative proceedings leading to the Freeman v. Summers decision, and the facts uncovered in the Hearings of the Senate Public Lands Committee pursuant to S. Res. 379, 71st Congress, to issue a decision to overrule Freeman v. Summers as Department precedent. The Secretary may take official notice of facts established in U.S. Geological Survey Bulletins as to the nature of the Green River Formation and its composition. The remaining question is whether some unpatented oil shale mining claims can meet the discovery standards in Freeman v. Summers if it is strictly applied.

It is noted here that Mr. Cason's letter of December 6, 1988 does not even discuss the timeliness of discovery for oil shale claims and other related issues, such as the loss of discovery, pertinent to the proper application of the discovery requirement to oil shale mining claims.

(4). Is Andrus v. Shell Oil Co. in error on facts and the law? Yes! See pp. 269-285 in the Appendix to the hearing held on April 22, 1988 on the then proposed oil shale mining claims Conversion Act, Senate Hearing 100-744, before the Subcommittee on Mineral Resources, Development, and Production, Committee on Energy and Natural Resources.

We believe that Andrus should be used as precedent only as to the claims that became the matter of this decision rendered by the Supreme Court.

Further, we believe that Andrus is premised on the notoriously erroneous Freeman v. Summers decision which has made the administration of the applicable Federal laws mentioned above a pure mockery, an invention designed to transfer into private ownership under the guise of "valid claims" valuable Federal oil shale lands. The story told in the above-mentioned briefs which exposed Freeman is a "must-read" by all those who wish to have a better understanding of the breakdown in our Federal Government's operations on oil shale claim matters. For the Supreme Court to premise its decision in Andrus largely on Freeman v. Summers, as purportedly ratified by the Senate and House as a result of certain hearings on Freeman v. Summers referred to in Andrus, operated, in our belief, to perpetrate a fraud on the American people, particularly if the Justice Department briefs presented to the appellate Courts in Andrus exposed the errors of fact and law in Freeman v. Summers.

On the issue of possible fraud -- which was raised as to whether it would be a fraud on the U.S. for DOI and BLM to apply the criteria in TOSCO v. Hodel and to issue oil shale patents on the basis of those criteria -- see the questions posed in the letter from the Rocky Mountain Chapter of the Sierra Club dated August 25, 1987 addressed to the Honorable J. Bennett Johnston, Chairman of Senate Energy and Natural Resources Committee, with copies to Chairman Morris Udall and

Chairman Nick Joe Rahall, both on the House Interior and Insular Affairs Committee.

Congress should overrule Freeman v. Summers, TOSCO v. Hodel, and Andrus v. Shell by an appropriate statutory provision. Otherwise it could be said that Congress itself is perpetrating a fraud on the American people: It knows or should know that these decisions are flatly in error because the purposes, intents, and requirements of the above major Federal acts have been effectively circumvented by these decisions. These decisions have been used by the DOI to give away vast acreages of oil shale lands. In our view, it was certainly irresponsible, if not fraudulent, for DOI and the Department of Justice not to have appealed TOSCO v. Hodel, for example, in light of the contents of the Draft Appeal Brief for use in TOSCO v. Hodel appeal, mentioned above, and in light of the content of the other legal briefs filed by the Regional Solicitor's Office in above mentioned contests.

Mr. Cason's letter totally disregards the effect of GLO and DOI decisions which declared claims null and void in the 1920's and 1930's on the charge of failure to do annual assessment work. Although we do not know how many of the claims in pending patent applications before the BLM are the subject matter of such prior final decisions by DOI or GLO, it is necessary for someone to find out as a fact whether the DOI and the BLM are treating such prior final decisions as having no legal effect.

It is our view that the DOI and BLM are without authority to disregard the old decisions, unless perhaps defective service of complaints in earlier proceedings is established, since it appears to us that when a claim has been declared null and void for failure to do assessment, the lands within the claim reverted retroactively to public domain at the end of the annual period for doing the required work-- and at that point of time the Mineral Leasing Act attached to the land and to oil shale within the former claim by operation of law. In light of the content of Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), administrative positions reflected in decisions Pre-Krushnic, must be given greater weight for their logic, rationale and interpretation of law. (See 44 L.D. 580 [1916], 32 L.D. 387, 50 L.D. 262 [1924], 52 L.D. 282 [1927], and 52 L.D. 295 [1928]). Also see relevant decisions of the Courts relative to the effect of failure to do annual assessment work, quoted or mentioned in the Draft Appeal Brief for use in appealing TOSCO v. Hodel, but which Draft Appeal Brief of 182 pages in length was apparently not used for this purpose in Interior and Justice in Washington.

Consequently, we question whether the Secretary of the Interior has the authority under present law to set aside such prior final decisions which had declared claims null and void in a manner as to circumvent the provisions of the Mineral Leasing Act so that patents may be granted under the U.S. Mining Laws to lands within claims previously declared null and void. This is especially true in situations where rights of third persons intervened to the land, even where the rights of the United States intervened after the claims were declared null and void. (See Brookhaven Oil Co., A-27439, 7/29/57, State of Louisiana, 61 I.D. 170 [1955], U.S. v. U.S. Borax Co., 58 I.D. 426, 430 [1943], H. W. Rowley, 58 I.D. 550 [11/24/43], Gabbs Exploration Co., 67 I.D. 165, 166 [1960]). Also, carefully study Hickel v. Oil Shale Corp., 400 U.S. 48 at 55 (1970) on how failure to do required assessment work should result in defeasance of a claim to the benefit of the United States, owner of the fee.

Additionally, if the claim has been declared null and void, it is our view that the Secretary, DOI, is without authority of law to dispose of the lands in such former claims under the U.S. Mining Laws (as amended). Again, we direct your attention to all the legal briefs prepared by the Regional Solicitor's office pertaining to all matters then in litigation which finally became the subject matter of Hickel v. TOSCO, a favorable decision to the U.S. written by Justice William O. Douglas. However, the major point that was left unresolved by the decision relates to the issue as whether or not the U.S. should be barred by Laches and Estoppel from invoking such prior final GLO and DOI decisions in the administration of the laws affecting oil shale claims, many of which are subject to the old decisions.

If the Secretary has authority to set aside the old decisions and chooses to do so, he must first give notice and an opportunity for a hearing to all third parties who have vested intervening rights of record with the BLM to the lands and minerals embraced in oil shale claims which have been declared null and void. The United States, by virtue of the provisions of the Mineral Leasing Act, has the standing, apparently, of an adverse intervening right holder to the lands and minerals within the claim that has been declared null and void. It could be a breach of trust for the Secretary to set aside such old decisions without first making some sort of arrangement within DOI for lawyers in the Regional Solicitor's Office, Denver, or for the U.S. Department of Justice to represent the U.S. in any proposed proceedings to set aside such old decisions and to protect the rights of the U.S. in the oil shale resource.

By virtue of the provisions of FLPMA for the sharing of revenues from Leasing Act substances, if the lands were held in Federal ownership, it would appear that each State in which oil shale lands are situated has a legal or equitable right sufficient enough to require the Secretary to give notice and an opportunity to be heard to that State before final action is taken by the DOI purporting to set aside GLO and DOI decisions which declared claims null and void years ago on the charge of failure to do annual assessment work. It would be appropriate to comment that, in our view, any State which fails to protest any action by DOI to set aside the old decisions would be breaching its trust to that State's public, present and future. In any event, the BLM Director does not have authority to set aside prior final decisions of DOI.

Approximately 30,000 oil shale mining claims were purportedly located, prior to the enactment of the Mineral Leasing Act of February 25, 1920, covering about 4,000,000 acres of public domain in Colorado, Utah, and Wyoming. Between January 1930 and the end of fiscal year 1933 approximately 23,245 unpatented mining claims covering about 2,884,019 acres of Federal oil shale lands in Colorado, Utah and Wyoming had been declared null and void on the charge of failure to do annual assessment work (and possibly on other additional charges) by the GLO and the Interior Department. (See pertinent Annual Reports of the Secretary of the Interior in this period.) Thus it would seem appropriate to conclude that the BLM and the Department of the Interior are making a calculated effort to circumvent the effect of decisions which declared claims null and void years ago in the Interior plan described in the letter dated December 6, 1988 to issue patents to purported oil shale mining claims, many of which, no doubt, are subject to such old decisions.

(5). What is the effect of DOI's allowing the first part of the issuance of the final certificate to proceed? It appears that the BLM adjudicators or their superior in the State Director's Office, BLM, in Colorado have executed the first part of the final certificates to claims that have been declared null and void on the assessment work charge decades ago. For instance, see the responses to additional Committee questions, pp. 209-224 of the 4/22/88 hearing before the Senate Subcommittee on Mineral Resources, Development, and Production (Senate Hearing 100-744, "Oil Shale Mining Claims Conversion Act"). The questions asked by the Committee failed to elicit whether claims had been declared null and void in old GLO mining contests. We believe that BLM and DOI should not permit adjudicators or their supervisor to execute the first part of the final certificate on claims which thentofore had been declared null and void in a legal proceeding i.e., had been extinguished.

If the claim is subject to an old decision which declared the claim null and void, we believe that it is improper and irregular for the BLM and DOI to proceed to publish a notice of patent application for such a claim in a newspaper nearest the lands pursuant to 30 U.S.C. 29. Although we feel that the publication for the requisite statutory period of the notice may cut off rights in third parties, such as grazing and oil and gas lessees, unless such third parties file an adverse claim in a timely manner, we believe the United States should not have its rights cut off in land embraced in such a claim, particularly where officers and employees of the BLM and DOI are acting more in the nature of agents for relinquishment of Federal oil shale lands to private parties, rather than carrying out their stewardship responsibilities under law. The issuance of the first part of the final certificate to the patent application means that the applicant no longer has to perform annual assessment work on claims in the application. BLM should have the lawyers in the Regional Solicitor's Office, Denver, review the propriety and legality of what is being done on oil shale claims in BLM, Denver. The legal work on claims appears to be done in Washington, D.C., since 1986 and we are not sure whether it is of good quality and dedicated to the public interest.

(6). What is the real significance of Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Virginia-Colorado Development, 295 U.S. 639 (1935)? To the best of our knowledge, the significance of both cases was not stated correctly in Cason's letter. In the latter case, a claimant had made arrangements for someone else to do the annual assessment work on the claim for the claimant prior to GLO serving the claimant with the contest complaint. The claimant preserved his rights by appeal up through the DOI in accordance with the then rules of practice and then sought judicial review to the Department's final decision in the District Court in D.C. When the claims involved got to the Supreme Court, the Court, based on the facts, concluded that the Secretary was without authority to have the claim(s) declared null and void for failure to do assessment work.

We have not reviewed the case records underlying Wilbur v. Krushnic and Virginia-Colorado Development to determine whether the Justice Department made a real effort in these cases and in the litigation in the lower courts to really win for the U.S. Considering the Depression circumstances then existent, it is likely that the courts leaned over backward on the assumption that they were protecting down-and-out miners in the oil shale country.

Hickel v. TOSCO, 400 U.S. 48 (1970), cleared up some of the obfuscation created by these above two Supreme Court decisions, and made it clear that the

Secretary possessed authority, long prior to Hickel v. TOSCO, and even prior to Krushnic, to declare claims null and void for failure to perform substantial annual assessment work. In other words, the holdings in these two earlier decisions were limited or confined by Hickel v. TOSCO to the precise facts involved in those decisions.

There exists no language in Hickel v. TOSCO to indicate in any way that the old GLO and DOI decisions discussed above are without effect.

The unresolved question remains, however, after Hickel whether the U.S. should be barred by Laches and Estoppel from invoking such old decisions in the administration of the U.S. mining laws. We believe that the U.S. cannot be bound or estopped by the longstanding erroneous practice in the DOI from the middle 1930's to the early 1960's of treating the old decisions as having no legal effect, notwithstanding the finality of such old decisions and the failure of the claimants to preserve their rights by appropriate appeals, etc. and thereafter in the courts.

In light of Hickel v. TOSCO and regardless of anything to the contrary in these two earlier Supreme Court decisions, it would seem that the body of law as enunciated by the Attorney General as well as by DOI in various cases pre-Krushnic and pre-Virginia Development involving situations where claimants failed to do the annual assessment work, the claims lapsed and certain withdrawals attached to the lands in such lapsed claims should be given greater weight.

We believe that DOI could declare a claim null and void on a charge that the claim lapsed in certain past years and the lands within the claim reverted to public domain when the present patent applicants' predecessors failed to do the annual assessment work, especially in those situations where the claim had not earlier been declared null and void.

We are not aware of any contest proceeding where this suggested charge was used, but the failure of DOI to use this charge does not reflect that the charge is not well founded.

The above suggested charge would be consistent with the intent and spirit of the Mineral Leasing Act, since the Mineral Leasing Act certainly must have had some operative effect on the application of the mining law, as amended, to oil shale mining claims.

We believe that Krushnic and Virginia-Colorado Development Co. decisions are inconsistent with the purposes and provisions of the Mineral Leasing Act.

Hickel v. TOSCO, on the other hand, provided an opportunity to the United States to protect its rights in oil shale lands consistent with the intents and purposes of the Mineral Leasing Act, but that opportunity was wasted when DOI and the Department of Justice failed to perfect a bona fide appeal to the 10th Circuit Appeals Court in Tosco v. Hodel, and, if necessary, taking the 524 claims to the Supreme Court for the ultimate determination of their validity or invalidity based on the record made in the courts and the administrative proceedings involving the 524 claims in the Department of the Interior.

(7). Are there other usable charges that were not mentioned in Cason's letter on which to contest oil shale claims? Yes! First, we believe that most if not all oil shale claims were abandoned by claimants many years ago. If a claim has been abandoned there is no way that some speculator can breathe life into an abandoned claim by acquiring a quit-claim deed from a claimant and then forfeiting out other purported co-owners of the claim by way of provisions found in 30 USCA 28.

Persons succeeding to the purported title of dummy locators hold the claims subject to all the defects of their predecessors in interest and subject to all the equities in favor of the United States. In other words, there can be no bona fide purchaser for value to an interest in an unpatented mining claim. See Hawley v. Diller, 178 U.S. 476 (1900); United States v. Brookshire Oil Company, 242 Fed. 718, 722 (1917); United States v. Laam, 149 Fed. 581 (1906); United States v. California Midway Oil Company, 259 Fed. 343, 351 (1919).

It should be noted that in the old contest proceedings in the 1920's and 1930's, many claimants failed to answer charges in complaints, so that this failure would constitute persuasive evidence that the claims had been abandoned. Also failure to do the required assessment work by the claimants (contestees) would constitute very good evidence that the claimant or claimants abandoned their claims. See Hickel v. Tosco, 400 U.S. 48 at 56, citing Union Oil Co. v. Smith, 249 U.S. 337, 349; Donnelly v. United States, 228 U.S. 243, 267, with reference to abandonment and to rights of the United States, where a claim is abandoned, in retrieving the lands under the Mineral Leasing Act. There exist in the possession of the BLM old GLO investigation reports which can be used as evidence to support charges in contest proceedings of abandonment, fraud in location, location for speculative rather than bona fide mining purposes, and other charges.

Second, failure to produce minerals (i.e. shale oil) in commercial quantities and profitably from each of the claims from 1920 to the present would constitute circumstantial evidence that the claims had been abandoned, that a valid discovery to satisfy the requirements of the mining laws had never been perfected prior to 1920, or that if a discovery had been perfected, the discovery was lost on each of the claims because of long run economic changes in the American economy that made profitable shale oil production impossible on each and every claim. Failure to produce shale oil from each claim since 1920, if not before, would also provide convincing evidence that the lands within each of the claims were non-mineral in character within the purposes of the mining law. Thus such lands prior to February 25, 1920 would not have been subject to location and disposal under the provisions of the mining laws. We believe that oil shale claims can be declared null and void in appropriate proceedings on the charge that the lands within each claim was non-mineral in character as of the date of enactment of the Mineral Leasing Act, and certainly also at present.

On the issue of whether oil shale lands should be deemed non-mineral in character, please see the tests used to determine this in U.S. v. Strauss, et al., 59 I.D. 129 [1945], John M. Debevoise, 67 I.D. 177 [1960], and State of California v. E. O. Rodeffer, 75 I.D. 177 [1968]. Since no oil shale has been mined, retorted, refined, and the oil from it put into the market place profitably during the last 69 years from each of the remaining unpatented claims (covering up to 250,000 acres in Colorado, Wyoming and Utah), how can anyone rationally contend that the oil shale lands included within each of the claims were mineral in character either in 1920 or now? There must be a limit on how long public land can be encumbered by purported mining claims which are not productive.

Therefore, an effort should be made to review all DOI decisions published in the L.D.'s, I.D.'s and certain court decisions involving the issue of what differentiates mineral from non-mineral lands under the mineral laws.

Third, we believe that pre-1920 unpatented claims can be contested on the charge that the U.S. eliminated each claim by adverse possession for a period in excess of 20 years. The lands within many of the claims, in the conduct of GLO contests, were effectively repossessed by the U.S., and notices were staked on the land by DOI agents stating that the land was repossessed by the United States under the Mineral Leasing Act. Thereafter, the U.S. for many years up to the present administered the land in such claims for oil and gas, grazing, recreation, etc. The adverse possession charge, among other charges, was stated in Contest 260, U.S. v. E.R.T.L., Inc. (BLM, Colorado). This contest was instituted in 1961, but in 1981 the contest complaint was apparently amended to eliminate the adverse possession charge. Under FOIA, anyone can request the BLM State Director in Colorado to provide a copy of the 1961 complaint in Contest 260 and the 1981 amended complaint. The State Director should be asked why the 1961 complaint was amended in 1981 and at whose direction.

The printed hearings of hearings held on oil shale claims on October 16, 1987 and April 22, 1988 before the Senate Subcommittee on Mineral Resources, Development, and Production can be obtained from the Subcommittee staff ((202) 224-2383). The October 16th hearing record contains a letter from Michael S. March to Chairman Rahall of the House Subcommittee on Mining and Natural resources, dated September 4, 1986, detailing other charges that can be used to contest claims.

Some additional comments. Since Congress has failed to properly investigate everything underlying and related to the August 4, 1986 Settlement Agreement in the TOSCO v. Hodel litigation, and its associated disposals of 82,000 acres of oil shale lands in Colorado containing 42 billion barrels of recoverable shale oil, we believe that legislation in the form of the present bills H.R. 643 and S. 30, at the present time is totally unwarranted for enactment into law. It is first necessary for Congress to carry out full-scale investigations of all matters relating to the administration, management, and disposals of oil shale lands under the guise of pre-1920 unpatented claims, from February 25, 1920 to the present. During this period, and excluding the 82,000 acre disposal, approximately 300,000 acres in Colorado alone were patented under similarly defective procedures and practices. Issuance of patents on pending oil shale claims should be embargoed by Congress until Congress authorizes the Secretary to proceed on pending claims.

Congress has failed in hearings held so far to properly develop for the record the sweep and thrust of the whole body of law, including DOI and court decisions, applicable to oil shale claims. If the claims are, in fact, invalid as we believe many are, then it could be said that Congress is taking steps to perpetrate more giveaways under H.R. 643 and S. 30, similar to those that would have been accomplished by H.R. 1109 and S. 2089, (100th Congress) if enacted into law, instead of stopping oil shale and associated mineral giveaways.

Appropriate investigations and hearings in Congress on oil shale scandals, past and present, may disclose that the solution to these problems is the institution by Interior of mining contests on all available charges, the proper preparation of contests, proper representation of the United States in the contests, and the proper representation of the U.S. in the courts, if judicial review is sought by claimants.

In addition, the government must first ascertain what remedies may exist for dealing with the 82,000 acre giveaway in 1986; this would similarly require complete and thorough investigations, including the testimony of present and former DOI and Justice Department officials, under oath; production of documents by Interior and Justice to Congress, including production of documents by private parties relevant to the 524 claims that became the matter of the August 4, 1986 settlement agreement. Congress as the ultimate trustee for the people of the United States, of the Federal oil shale lands, must act to investigate all matters and events underlying the 1986 settlement agreement and the resulting disposals of 82,000 acres of their Federal oil shale land, including Interior's plan for further oil shale land disposals as set forth in the December 6, 1988 letter to then Chairman Melcher.

Congress should not act to cover up the Federal oil shale land scandals in Interior and Justice by hastily enacting either H.R. 643 or S. 30 into law without first making appropriate investigations and holding thorough hearings to ascertain the deficiencies to be corrected in public-land-law administration in our Federal Government pertaining to Federal oil shale laws -- and to ascertain what legislation, if any, needs to be enacted into law to clean up the longstanding oil shale mess in our Federal Government.

A copy of the U.S. Supreme Court's decision in Hickel v. Oil Shale Corp., 400 U.S. 48 (1970) is attached hereto to highlight the importance of the old GLO and DOI decisions which declared oil shale mining claims null and void on the charge of failure to do required annual assessment work. Interior, and even Congress itself, on shale claim matters has been, in our view, totally misapplying and/or circumventing or disregarding the law as clarified in Hickel v. Oil Shale Corp.

Congress must handle oil shale matters on the merits or else future generations of Americans will recognize and remember for decades and even centuries into the future the breach of their trust owed to the American people if oil shale matters are not handled on their merits, in Congress, in the Executive Branch, and in the Courts.

By this statement, I respectfully request the Secretary of the Interior, The Honorable Manuel Lujan, Jr., and the Congress not to disregard or undercut the interests of the American people in the Federal oil shale lands. I respectfully submit that H.R. 643 will precisely undercut the interests of the American people in up to 250,000 acres of Federal oil shale lands. The bill, in our view, is defective and unworkable to properly resolve oil shale matters in our Federal Government in connection with unpatented oil shale mining claims, containing up to 100 billion barrels of recoverable shale oil.

In our view, it would be a tragic mistake or blunder for Congress to enact a bill which might be used by the Department of the Interior to promulgate regulations designed to circumvent the present requirements of the U.S. Mining Laws in a manner as to validate pre-1920 unpatented oil shale mining claims. Gifts in the magnitude of billions of dollars by way of legislation on the part of Congress to purportedly settle oil shale claim controversies would, indeed, not be acceptable to the American people if the facts are made fully known to them.

February 27, 1989

12/13/88 12:25 INTERIOR DEPT. NO.004 002

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 8 1988

Honorable John Melcher
Chairman, Subcommittee on Mineral Resources
  Development and Production
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to inform you that the Department of the Interior intends to begin the further processing of oil shale mining claims patent applications pending in the Colorado and Utah State Offices of the Bureau of Land Management (BLM). We have decided to end our self-imposed delay on further processing these patent applications, including verification of whether the claims in question meet the test of discovery of a valuable mineral deposit within the meaning of the mining laws, and whether such claimants have substantially complied with the assessment work requirements.

We had hoped to reach a consensus with Congress on these issues prior to deciding to go forward with the task of making these determinations. Now that the 100th Congress has adjourned without enacting oil shale legislation, the Department feels compelled to carry out its duties under the Mining Law of 1872 to adjudicate the validity of mining claims for which a mineral patent is sought. As you know, two of the applications in Colorado have been pending since 1982. Our policy will be to expeditiously process mineral patent applications and either issue patent to the successful claimant or contest the claims the BLM alleges to be invalid.

Our standards for the determination of validity of these oil shale claims shall be consistent with the statutes as interpreted by the U.S. Supreme Court. The standard of discovery of a valuable oil shale deposit shall be:

> An exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim yielding 15 gallons or more of shale oil per ton of rock, in beds not less than one foot thick, yielding 1500 barrels or more per acre. Further, this standard may be met by an exposure of a marlstone tongue of the Green River Formation, yielding not less than three gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the uppermost strata of prospectively valuable rich beds of oil shale lying at depth within the boundaries of the mining claim, but the inferred connection of the qualifying marlstone tongue need not occur within the confines of the mining claim.

This standard was formulated in Freeman v. Summers (1927), and subsequently held to be the correct interpretation on discovery by the U.S. Supreme Court in Andrus v. Shell Oil Co. (1980).

The standard for measuring substantial compliance with assessment work requirements of the mining law shall be:

> A mining claimant shall annually perform not less than $100 worth of labor or make improvements valued at not less than $100 per claim in an effort to develop a valuable mine. A lapse of qualifying assessment work performance of two or more years duration is sufficient basis upon which the United States may contest the validity of the mining claim, except that resumption of assessment work prior to the initiation of a challenge is an absolute defense in a contest brought on that basis.

This criterion is the result of several cases interpreting the Federal Government's role in policing assessment work performance. In Hickel v. TOSCO (1970), the Court held that the United States could contest mining claims for which only insubstantial or "token" assessment work was alleged to have been performed, but let stand earlier rulings which greatly limit the basis upon which such challenge could be made. Wilbur v. Krushnic (1930) holds that the resumption principle of the mining law (30 USC §28) bars challenge of mining claims by the Government as well as by rival claimants after assessment work is resumed. Virginia-Colorado Development Corp. v. Ickes (1933) holds that a lapse of one year in duration is not sufficient to support a contest by the Government.

As always, we remain available to discuss our views on these issues. Should Congress continue to feel compelled to propose legislation to address oil shale claims, we would be pleased to participate in the process to ensure that reasonable, equitable legislation is forthcoming.

Sincerely,

James E Cason

Deputy Assistant Secretary - Land and
Minerals Management

Message 483-1060

12/16/88
6279t

Subj: Memorandum regarding the processing of oil shale patent applications

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

EMS Transmission 12/16/88
Memorandum

3842 (680)

To: State Directors - Colorado and Utah

From: Director

Subject: Processing of Oil Shale Patent Applications

Purpose

The purpose of this memorandum is to provide guidance for the disposition of mineral patent applications for oil shale placer mining claims. The timing of this guidance is prompted by the attached letter to Senator Melcher from Principal Deputy Assistant Secretary Cason. This letter also contains the standards by which the Bureau is to adjudge the existence of a valuable oil shale deposit, and whether there has been substantial compliance with assessment work requirements, including the application of the resumption principle of the mining law (30 U.S.C. §28).

Timing and Procedures

Work on the further processing of the pending patent applications is to commence as soon as possible. Applications should generally be processed in the order that they have been received, with the exception that where a mineral report on a claim group can be prepared without resort to additional field work the processing of that application should be a priority.

Because of the continuing Congressional interest in these oil shale claims, please notify the Director (100) prior to the issuance of any patents. It will not be necessary to routinely supply documentation to the Headquarters Office of the proposed action. The decision to patent or contest mining claims remains delegated to State Directors.

To be able to respond to inquiries better in the Washington Office, please provide by December 23, 1988, your best estimate as to when the necessary mineral reports can be finalized for those patent applications for which the first part of the Final Certificate has already been issued, or for which some field work to verify discoveries and assessment work compliance has already been performed. We will rely upon the semi-annual patent application report to track the progress of the newer applications still undergoing adjudication.

Validity Standards

The standards to be applied in the preparation of mineral reports on these oil shale claims are as stated in the attached letter. While we are not required to have promulgated these standards as rules (because the conflicting IBLA precedents were mooted in the negotiated settlement of the TOSCO v. Hodel litigation) you should be aware that an effort to publish draft regulations is indeed underway. The preamble to the proposed rules describes in detail the rationale for these standards.

Attachment
Letter of 12/07/88 to Chairman Melcher

signed by: A.A. Sokoloski
Deputy Assistant Director - Energy
and Mineral Resources (Solids)

authenticated by: William Condit
W.O. 680 EMS Coordinator

HICKEL, SECRETARY OF THE INTERIOR *v.* OIL SHALE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 25. Argued October 22, 1970—Decided December 8, 1970

The General Mining Act of 1872 provided that until a patent issued for a mineral location on lands belonging to the United States "not less than $100 worth of labor shall be performed or improvements made during each year," and that a patent could issue on a showing that the claimant had expended $500 of labor or improvements on the claim. Failure to do the assessment work generally entitled others to relocate the claim. Under the Mineral Lands Leasing Act of 1920 lands theretofore open to location and acquisition of title became available only on a lease basis, but a Saving Clause covered valid claims existent on February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated." All the claims involved in this suit were canceled by the Secretary of the Interior in the early 1930's because the annual assessment work, required by the 1872 Act, had not been performed. In attempting to establish their oil shale claims in Colorado under the 1872 Act, respondents brought this action in the District Court to require the Secretary of the Interior to patent the claims or to expunge his rulings canceling the claims for lack of annual assessment work and to enjoin him from enforcing them. The District Court and the Court of Appeals, ruling in favor of respondents, held that the Department of the Interior had no jurisdiction to cancel the claims. The courts relied on *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, where this Court declined to interpret the Mineral Leasing Act as requiring the return to the Government of full possessory rights to lands subject to oil shale claims for defaults in assessment work. The decisions indicated that failure to perform such work made the claims subject to relocation by others but not forfeiture to the Government. *Held:* The Saving Clause of the Mineral Leasing Act makes the United States the beneficiary of all claims that are invalid for lack of assessment work or otherwise, and the Department of the Interior had subject matter jurisdiction to determine whether respondents' claims were "maintained" within the meaning of that clause, including the performance of adequate assessment work. *Krushnic, supra,* and *Virginia-Colorado, supra,* must be confined to situations where there has been substantial compliance with the assessment work. Pp. 51–58.

406 F. 2d 759, reversed and remanded.

Douglas, J., delivered the opinion of the Court, in which Black, Brennan, and Blackmun, JJ., joined. Burger, C. J., and Stewart, J., filed a dissenting statement, *post,* p. 61. Harlan, White, and Marshall, JJ., took no part in the consideration or decision of the case.

Peter L. Strauss argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill, Thos. L. McKevitt,* and *Edmund B. Clark.*

Fowler Hamilton argued the cause for respondents. With him on the briefs for respondents Oil Shale Corp. et al. were *Richard W. Hulbert* and *Donald L. Morgan. John D. Knodell, Jr., Fred M. Winner,* and *Warren O. Martin* filed a brief for respondents Umpleby et al.

Mr. Justice Douglas delivered the opinion of the Court.

This case involves six groups of claims to oil shale located in Colorado and asserted under the General Mining Act of 1872, 17 Stat. 91, now 30 U. S. C. §§ 22, 26, 28, and 29. Section 28 provides that until a patent issued "not less than $100 worth of labor shall be performed or improvements made during each year."[1] And § 29

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[1] Section 28 reads in part:

"On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, provides that a patent to the claim could issue on a showing that the claimant had expended $500 worth of labor or improvements on the claim. These claims are not patented and were canceled in the early 1930's on the ground that the amount of labor or improvements specified in § 28 had not been made "during each year."[2]

Some of the claimants in this case applied for patents between 1955 and 1962. The General Land Office rejected the patent applications because the claims had been canceled. On appeal, the Secretary of the Interior, acting through the Solicitor, ruled that these cancellations were effective, later judicial determinations of the invalidity of the grounds for cancellation notwithstanding. *Union Oil Co.*, 71 I. D. 169.[3] These claimants then sought an order to compel the Department to issue the patents. They argued that the Land Office was without authority to cancel the claims when it did and that the Secretary of the Interior had nullified all the contest proceedings in 1935. In the alternative, they sought judicial review of those contest rulings. Respondent Oil Shale Corp. commenced this action in the District Court, not to require the Secretary to

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their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. . . ."

Section 29 reads in part:

"The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors . . . ."

[2] For a description of the claims involved in this case see the Appendix to this opinion.

[3] It was admitted that the cancellations may have been erroneous. He declared, however, that the Commissioner of the General Land Office had jurisdiction to make the determinations. Therefore, since the rulings were not appealed from, they were *res judicata*, not subject to attack in 1962.

issue a patent, but to expunge the rulings of the Secretary canceling the claims and to enjoin him from enforcing them. All the cases were consolidated for trial in the District Court. The District Court granted the relief, 261 F. Supp. 954, and the Court of Appeals affirmed, 406 F. 2d 759, both holding that cancellations for lack of assessment work were void because the Department did not have jurisdiction over the subject matter. The case is here on petition for certiorari, which we granted to consider whether *Wilbur* v. *Krushnic,* 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, had been correctly construed and applied to invalidate the Secretary's action in protection of the public domain.

Before we come to a consideration of the *Krushnic* and *Virginia-Colorado* cases it should be noted that in 1920, Congress by enacting § 21 of the Mineral Lands Leasing Act, 41 Stat. 445, 30 U. S. C. § 241 (a), completely changed the national policy over the disposition of oil shale lands. Thereafter such lands were no longer open to location and acquisition of title but only to lease. But § 37 contained a Saving Clause which covered "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." 30 U. S. C. § 193. Respondents contend that their claims fall within that exception.

Respondents assert that a like claim was recognized and approved in the *Krushnic* case. In that case, however, labor in the statutory amount had been performed, including the aggregate amount of $500. The only default was in the failure to perform labor for one year during the period. Mandamus for the issuance of a patent was directed, the Court saying:

> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve

> the possessory right, with all the incidents of ownership . . . , as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted." 280 U. S., at 317.

The Court further held that the claims were "maintained" within the Saving Clause of the Leasing Act by a resumption of the assessment work before a challenge of the claim by the United States had intervened.

Virginia-Colorado also involved claims on which labor had been expended except for one year. It was alleged, however, that the claimant had planned to resume the assessment work but for the Secretary's adverse action and that the claims had not been abandoned. The Court held that the claims had been "maintained" within the meaning of the Saving Clause of the Leasing Act of 1920.

Those two cases reflect a judicial attitude of fair treatment for claimants who have substantially completed the assessment work required by 30 U. S. C. § 28. There are, however, dicta both in *Virginia-Colorado* and in *Krushnic* that the failure to do assessment work gives the Government no ground for forfeiture but inures only to the benefit of relocators.

Indeed 30 U. S. C. § 28, which derives from the 1872 Act, as already noted,[4] provides that upon the failure to do the assessment work, "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made," provided the assessment work has not been "resumed" upon the claim "after failure and before such location." It is therefore argued that so far as the 1872 Act is concerned the failure to do the assessment work concerns not the Government but only "rival or adverse claimants."[5]

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[4] See n. 1, *supra*. For a recent account of the operation of the 1872 Act and the Leasing Act of 1920 see One Third of the Nation's Land, Report by the Public Land Law Review Commission 124–138.

The problem in those two cases and the present one concerns the Saving Clause in the Leasing Act which, as noted, makes available for patent "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated." Concededly, failure to maintain a claim made it "subject to disposition only" by leasing by the United States. See § 37 of the 1920 Act, 30 U. S. C. § 193. Hence if we assume, *arguendo*, that failure to do assessment work as provided in the 1872 Act concerned at the time only the claimant and any subsequent relocator, the United States, speaking through the Secretary of the Interior, became a vitally interested party by reason of the 1920 Act. For it was by that Act that Congress reclaimed portions of the public domain so that land might be disposed of by a different procedure (leasing) to the same end (oil shale production[6]) or devoted to wholly different purposes[7] within the purview of public policy as determined by Congress.

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[5] The regulations provide:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U. S. C. 28), is . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." 43 CFR § 3420.4.

[6] The value to the Government of the Leasing Act is shown by the magnitude of the interests at stake. We are told that respondent Oil Shale Corp. bid for a lease of 5,120 acres of federal oil shale land in Colorado. 33 Fed. Reg. 16154. The projected

It appears that shortly before 1920 oil shale claims were affected by a speculative fever. Then came a period of calm. By the late forties and continuing into the sixties speculators sought out the original locators or their heirs, obtained quitclaim deeds from them, and thereupon eliminated all other record titleholders by performing assessment work for one year.[8] It appears that 94 of the 98 claims involved in the present litigation were of that character. There is nothing reprehensible in the practice, if the procedure is one which Congress has approved. But the command of the 1872 Act is that assessment work of $100 be done "during each year" and the Saving Clause of § 37 of the 1920 Act requires that for lands to escape the leasing requirement the claims must be "maintained in compliance with the laws under which initiated."

The legislative history of the 1872 Act does not throw much light on the problem. Senator Cole, proponent of that Act, explained, however, that the requirement of assessment work was made to adopt the Spanish law which granted mining titles but subjected them "to what they term denouncement of the title or defeasance of the title upon a failure to work the mine after a certain

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operations were estimated to yield 40 gallons of oil per ton, the royalty being 24¢ per ton. *Id.*, at 16156. The projected mining rate of 66,000 tons per day for 330 days a year would produce an annual royalty of close to $5,230,000. The project life was 20 years.

[7] The lands containing oil shale became open to agricultural and other nonmineral entries including, *inter alia*, those under the Stock-Raising Homestead Act of 1916, 39 Stat. 862, 43 U. S. C. § 291 *et seq.*, to oil and gas and sodium leasing under the 1920 Act, to Indian tribal lands in Utah and to grazing districts under the Taylor Grazing Act, 48 Stat. 1269, 43 U. S. C. § 315 *et seq.*

[8] See n. 3, Appendix, *infra*.

time." Cong. Globe, 42d Cong., 2d Sess., 2459 (1872). While the objective of the 1872 Act was to open the lands "to a beneficial use by some other party," once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee. On that premise it would seem that the dicta in *Krushnic* and in *Virginia-Colorado* are not valid.

The history of the 1920 Act throws a little light on the problem.

In the Senate there was considerable debate over the addition of the words "including discovery" at the end of § 37, which contains the Saving Clause.

> "Mr. JONES of New Mexico. Suppose we use the words 'including discovery.'
>
> "Mr. SMOOT. Very well; if the Senator desires to insert the words 'including discovery' I shall offer no objection.
>
> "Mr. WALSH of Montana. Mr. President, I was going to say to Senators that to my mind discovery does not necessarily perfect the claim, because the claimant would not be entitled to a patent unless he had performed $500 worth of work, and in a just sense his claim would not be protected.
>
> "Mr. SMOOT. The words 'under such laws' cover everything—the $500 worth of work, discovery, and everything else.
>
> "Mr. WALSH of Montana. But the words 'including discovery,' now proposed, it seems to me, will make it plain.
>
> "Mr. SMOOT. I have no objection to those words going in the bill." 58 Cong. Rec. 4584.[9]

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[9] The amendment was thereupon agreed to. There was no change made in the House in this respect. H. Rep. No. 398, 66th Cong., 1st Sess., 11. And see the Conference Report, H. R. Rep. No. 600, 66th Cong., 2d Sess., 16.

The "perfection" of the claims "under such laws" thus seemingly meant compliance with "everything" under 30 U. S. C. § 28, which taken literally would mean assessment work of $100 "during each year."

If we were to hold to the contrary that enforcement of the assessment work of § 28 was solely at the private initiative of relocators, the "maintenance" provision of § 37 becomes largely illusory, because relocation of oil shale claims became impossible after the 1920 Act. So if enforcement of the assessment work requirement of § 28 were dependent solely on the activities and energies of oil shale relocators, there was no effective enforcement device. While the area covered by the claims might possibly be relocated for wholly different purposes, the likelihood was so remote that the Court of Appeals concluded that: "The old claims were thus sheltered by the [1920] Act." 406 F. 2d, at 763. That meant that a claim could remain immune from challenge by anyone with or without any assessment work, in complete defiance of the 1872 Act.

The Court concluded in *Virginia-Colorado* that the lapse in assessment work was no basis for a charge of abandonment. 295 U. S., at 645-646. We construe that statement to mean that on the facts of that case failure to do the assessment work was not sufficient to establish abandonment. But it was well established that the failure to do assessment work was evidence of abandonment. *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349; *Donnelly* v. *United States,* 228 U. S. 243, 267. If, in fact, a claim had been abandoned, then the relocators were not the only ones interested. The United States had an interest in retrieving the lands. See G. Widman, T. Brightwell, & J. Haggard, Legal Study of Oil Shale on Public Lands 189-193 (1969). The policy of leasing oil shale lands under the 1920 Act gave the United States a keen interest in recapturing those which had not been "maintained" within the meaning of § 37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U. S. C. § 28, is not adequate to "maintain" the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support *Krushnic* and *Virginia-Colorado* on so broad a ground. Rather, their dicta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant, granted by 30 U. S. C. § 26, will not be disturbed on flimsy or insubstantial grounds.

Unlike the claims in *Krushnic* and *Virginia-Colorado*, the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation. We disagree with the dicta in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work. We conclude therefore that the judgments below must be reversed.

Respondents rely upon the response of the Department of the Interior to the *Virginia-Colorado* case in which the Secretary declared the contest in that case to be "void." He also declared that "other Departmental decisions in conflict with this decision are hereby overruled." *Shale Oil Co.*, 55 I. D. 287, 290. This decision, they argue, nullified the previous contest proceedings in which these claims were voided. Moreover, they contend that this administrative rule of 35 years, upon which the Department itself has relied, may not now be retroactively changed. In addition, they claim that these contest decisions, if still valid, are subject to direct judicial review at this time, testing both substantive and procedural errors, such as lack of notice.[10]

These contentions present questions not decided below. Therefore, on remand all issues relevant to the current validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud, and the like. Likewise all issues concerning the time, amount, and nature of the assessment work will be open so that the claimants will have an opportunity to bring their claims within the narrow ambit of *Krushnic* and *Virginia-Colorado*, as we have construed and limited these opinions.

Reversed and remanded.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[10] The Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of Calif.*, 72 I. D. 313.

APPENDIX TO OPINION OF THE COURT

One group of claims in question was composed of 48 (Bute) claims located by nine individuals between December 1919 and January 1920, shortly before February 25, 1920, the cutoff date for prior valid claims recognized by the Saving Clause of the 1920 Act.[1] The records show an entry in February 1921 of a "Notice in Lieu of Labor."[2] No other entries were made. In 1954, a man by the name of Ertl acquired the claims of two of this group. In 1955, he filed an "Affidavit of Annual Labor" and published a forfeiture notice in the newspaper.[3] In 1956, he acquired a decree ir a Colorado court quieting title in him to all interests in all the claims of this group. Another group of 18 (Atlas) claims was located in December 1919 by nine individuals. In February 1921, a "Notice in Lieu of Labor" was filed. No other instruments were filed. In 1954, Ertl acquired the interests of two of this group. In July 1955, he filed an "Affidavit of Annual Labor" and published a forfeiture notice. In September, a man named Dutton acquired an interest in the claims of two locators of this group and, in May 1956, Ertl quieted title in himself to the entire group. Another group of 20 (Camp Bird) claims was located in 1920. No instruments were filed regarding annual labor. In 1955, Mr. Dutton acquired the interests of two of the eight locators, and Mr. Ertl acquired the interests of four in 1956. Ertl filed an "Affidavit of Annual Labor" and published a forfeiture notice. Dutton responded and a court quieted title in the two of them, 75% in Ertl and 25% in Dutton.

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[1] Section 37 of the Act, 30 U. S. C. § 193, reads in part: "The deposits of . . . oil shale . . . herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided [in this Act], except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

[2] Congress suspended the $100 labor or improvements requirement for the year 1919. Such suspensions were also allowed by Congress for the years 1933 to 1938, 1942, 1943, 1948, and 1949.

[3] By a provision of the 1872 Act, now 30 U. S. C. § 28, where any of several co-owners has not contributed his share of assessment work, one or more co-owners who have done the work may give the delinquent co-owner notice in writing or by publication for at least once a week for 90 days and if at the end of that time the delinquent fails or refuses to contribute his share, "his interest in the claim shall become the property of his coowners who have made the required expenditures." That federal right is enforceable in state courts. See *Hamilton* v. *Ertl*, 146 Colo. 80, 360 P. 2d 660.

For the history of the law which allows assessment work on one claim to inure to the benefit of a group of claims see *Union Oil Co.* v. *Smith*, 249 U. S. 337, 350–351.

In January, Ertl transferred all his interest in the above claims to Energy Resources Technology Land, Inc. (ERTL). Mr. Dutton transferred any interest he held in the above claims to ERTL and ERTL conveyed title to 16 of the Bute claims, Nos. 33–48, to Dutton. These 16 claims were eventually purchased by Oil Shale Corp. for $1,536,000. In 1963, Oil Shale leased all of the remaining claims from ERTL for $148,000 per year. Forty-six of the Bute claims, including the 16 purchased by Oil Shale, nine of the Atlas claims and all 20 of the Camp Bird claims are involved in the litigation here.

Another group of 20 claims (Carbon 1–8 and Elizabeth 1–12) passed through several hands, and after notice and forfeiture, as above, is held by Wasatch Development Co. and Joseph Umpleby. Sixteen of these are involved here. Another group of four (SW, NW, NE, & SE) claims has a similar history, and three of those are involved here. The last group of claims (Cyler 1-4) is the only group in which there has been no claim of forfeiture. All four of these are involved here.

THE CHIEF JUSTICE and MR. JUSTICE STEWART dissent. They believe the Court of Appeals in this litigation correctly construed and applied this Court's decisions in *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639. Accordingly, unless those decisions are to be overruled, they would affirm the judgment before us.

August 11, 1989

Honorable John Glenn
Chairman, Senate Committee on
Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Federal oil shale lands scandals in our Federal Government. When will Congress act properly on the scandals?

Dear Chairman Glenn:

This letter is in connection with a copy of the self-explanatory letter dated April 6, 1989, addressed to Senate Majority Leader George J. Mitchell. A copy of the April 6, 1989 letter, without enclosures thereto, is herewith enclosed for your ready reference and action.

I sent the copy of the April 6, 1989 letter with the enclosures thereto to you as Chairman, Senate Committee on Governmental Affairs, to S.H. 503, which may be your Senate Office. You may never have seen or read the copy of the April 6, 1989 letter with the enclosures listed in said letter. Possibly, a staff employee in your office handled the April 6, 1989 letter and enclosures thereto for you.

In any event, sometime later, a month or so later, I received a form letter from your office purporting to indicate that the copy of the April 6, 1989 letter and the enclosures thereto, were provided to my Senator, Honorable Brock Adams, apparently for the purpose of having him assist me on a constituent problem -- the matters raised and discussed or referred to in the April 6, 1989 letter and in the enclosures mentioned in the April 6, 1989 letter to Majority Leader Mitchell.

By sending you a copy of the April 6, 1989 letter, together with the enclosures listed in the April 6, 1989 letter, I intended that you, as Chairman, Senate Committee on Governmental Affairs, take steps to put on the agenda of the Committee for action all the matters discussed in the April 6, 1989 letter addressed to Senate Majority Leader Mitchell, including the matters outlined or discussed in the enclosures to the April 6, 1989 letter as well as all matters referred to in the documents or briefs referred to in the documents or briefs referred to or mentioned in the enclosures to the April 6, 1989 letter. Accordingly, I hereby specifically request that you, as Chairman of the Senate Governmental Affairs Committee (1) retrieve the materials supplied by you to the Office of U.S. Senator Brock Adams, and that (2) you request all the members of the Senate Committee on Governmental Affairs to proceed to take steps without further delay to properly investigate and hold hearings on all matters relating to and underlying the Federal oil shale lands scandal in our Federal Government (in all three branches of our Federal Government) and also to act with deliberate speed to clean up the oil shale lands scandal in our Federal Government.

If the materials supplied by you to Senator Brock Adams cannot be retrieved by you, I authorize you and/or the Chief Counsel of Senate Governmental Affairs

Committee to obtain copies of all letters and materials I have supplied heretofore in 1989 to Majority Leader Mitchell and to Chairman Patrick J. Leahy, Senate Committee on Agriculture, Nutrition and Forestry.

By copy of this letter to Senator Brock Adams I respectfully request him to help me to get the Senate Governmental Affairs Committee or any other Senate Committee to act appropriately to investigate and clean up the Federal oil shale lands scandal in our Federal Government before legislation along the lines of H.R. 2392 passed by the House of Representatives on June 1, 1989 as a substitute to H.R. 643 (see pages H.2254-H.2263, daily Congressional Record of June 1, 1989) is enacted by the U.S. Senate.

H.R. 2392, in my view, is most unworkable, unsatisfactory and an unnecessary piece of legislation. The bill apparently was designed to cover up the Federal oil shale lands scandal in our Federal Government and to validate certain pre-1920 alleged oil shale placer claims for purposes of the bill so that additional giveaways of the Federal oil shale resources can be made to certain private interests as provided in the bill, if the bill is enacted into law.

H.R. 2392, in light of the content of the enclosures to the April 6, 1989 letter and in the content of the legal briefs referred to in the enclosures, in my view, constitutes, in itself, a national scandal on oil shale land matters in the House of Representatives of the U.S. Congress. The legislative process underlying and relating to said bill, in my view, was most defective and flawed. Relevant facts pertaining to alleged pre-1920 claims and relevant law applicable to said claims were not properly explored or developed in Hearings by the House Interior and Insular Affairs Committee or its Subcommittee on Mining and Natural Resources. H. Rept. No. 101-65, in my view, is a defective and misleading document which appears to have been prepared to rationalize the validity of H.R. 2392, and the need thereof, by failing to disclose the true situation in the past as well as present in our Government on pre-1920 oil shale mining claims.

By copy of this letter to Senator Brock Adams, I respectfully request him, or his office in D.C., to reproduce the copy of my letter of April 6, 1989 letter addressed to Majority Leader Mitchell, together with all the enclosures thereto, and that said copies of documents and materials be provided to U.S. Senator Slade Gorton from the State of Washington for his information and appropriate action -- so that the two U.S. Senators from the State of Washington may proceed, in accordance with my wishes, to take steps in a bi-partisan effort to protect the interests of the people in the State of Washington and in this Nation in the Federal oil shale lands and resources and, further, to take steps in the U.S. Senate to clean up the Federal oil shale lands scandal in our Federal Government as recommended by me in the April 6, 1989 letter to Majority Leader Mitchell.

I am not aware of any legitimate reason or any law why I, as a U.S. citizen, may not petition or request any U.S. Senator for curative or corrective relief in connection with the multi-billion dollar oil shale lands scandals in our Federal Government. Accordingly, I respectfully request again that you, as Chairman, Senate Committee on

Governmental Affairs, proceed, without delay, to take affirmative steps to place before the members of the entire Committee the matter of the Federal oil shale scandal in our Federal Government for appropriate action without further delay. I also respectfully request Majority Leader Mitchell and Chairman Leahy, by copy of this letter to each, to cooperate with you as necessary.

The Federal oil shale lands scandal remains unabated in our Federal Government notwithstanding the fact that H.R. 2392 passed the House of Representatives on June 1, 1989. H.R. 2392, in effect, has enlarged and compounded the Federal oil shale lands scandal in our Federal Government. The Senate cannot afford to further enlarge and compound the Federal oil shale lands scandal by enacting a bill along the lines of S.30 and/or H.R. 2392.

My comments made in a May 26, 1987 memorandum reflected at pages 286-290, S. Hrg. 100-744, relative to H.R. 1039 and House Report 100-43, are essentially applicable to H.R. 2392 and House Report 101-65 and to S.30.

Recent developments in Congress on oil shale pre-1920 unpatented claim matters, appear, indeed, to have taken on a nefarious twist. It has been rumored in Colorado that H.R. 2392 has been made part of an appropriations bill, purportedly passed by the House of Representatives and sent over to the Senate, which bill the Senate may be in the process of debating. But I have not been able to confirm whether there is any validity behind the rumor. On July 26, 1989, U.S. Senator Wirth from Colorado, issued a press release to indicate that his bill, S. 30, and H.R. 2392 would be the matter of the hearing then scheduled before the Senate Subcommittee on Mineral Resources, Development and Production of the Senate Energy and Natural Resources Committee, for July 31, 1989.

There was no publicity in advance of the hearing in the Denver Post or in the Rocky Mountain News, known to me, to inform the public that the July 31, 1989 hearing before the above Subcommittee would be held on S. 30 and H.R. 2392. Opponents to S. 30 and H.R. 2392, may have been selectively excluded from the list of those apparently invited or requested to testify on July 31, 1989 before the Subcommittee hearing held on July 31, 1989, reportedly chaired by Senator Wirth. Senator Wirth's press release of July 26, 1989, also, in my view, does not reveal the facts underlying and/or relating to S. 30 and H.R. 2392 and the oil shale lands scandal in our Federal Government. The release does not reveal the estimated recoverable barrels of shale oil in the lands, the matter of each of said bills, if enacted into law.

Multi-billion dollar oil shale matters in our Federal Government cannot continue to be properly handled under circumstances of apparent deception, misrepresentation, mismanagement and failure to properly expose the facts regarding alleged pre-1920 unpatented oil shale mining claims and their apparent or known invalidity, certainly as to the vast majority of them.

Committees of Congress cannot properly handle oil shale matters without even developing adequately for the record the law presently applicable to certain unpatented mining claims, particularly the law as known to three knowledgeable and experienced Interior Department lawyers presently employed in the Regional Solicitor's Offices, Denver Federal Center, phone (303) 236-8444. Albert V. Witham, Esq., Lowell Madsen, Esq. and Lyle Rising, Esq., no doubt, can testify before any Senate Committee or Subcommittee, if requested and subpoenaed, on all oil shale matters within their knowledge. Fifty man years, or more, of cumulative experience and knowledge in regard to oil shale matters possessed by said three above-named Interior lawyers must no longer be willfully and/or negligently avoided or disregarded by any U.S. Senate Committee or Subcommittee or by the Secretary of the Interior. One or more of said lawyers recommended appeal of Tosco v. Hodel (611 Fed. Supp. 1130, U.S.D.C., Colo., 5/1/85) which case allegedly led to the August 4, 1986 Settlement Agreement.

These above-mentioned Interior lawyers in Denver should be given an opportunity to testify on all matters relating to pre-1920 alleged oil shale mining claims; the content of the draft appeal brief for Tosco v. Hodel prepared in the Regional Solicitor's office and how the brief was disregarded in Washington, D.C.; the Settlement Agreement of August 4, 1986 and giveaways thereunder; and to give their views on S. 30 and H.R. 2392 and the need for, if any, on new legislation to be enacted into law.

Senate Committees must not pretend that all is well in the Interior and Justice Departments on oil shale claim matters. Senate Committees have not yet properly investigated the August 4, 1986 Settlement Agreement signed by then former or present officials in our Federal Government, which resulted in the giveaway, subject to the terms of the Agreement, of 82,000 acres of Federal oil shale lands in the State of Colorado, containing 42 billion barrels of estimated recoverable shale oil.

Enclosed is a copy of a clipping from the Rocky Mountain News, Tuesday, August 1, 1989, page 12, captioned "Armstrong vows death of Wirth's shale bill." It should be noted that Senator Wirth's press release of July 26, 1989 did not characterize the August 4, 1986 Settlement Agreement and resulting giveaways thereunder as a "scandal" but apparently Senator Wirth in the July 31, 1989 hearing characterized the August 4, 1986 Settlement Agreement and resulting disposals of 82,000 acres at $2.50 an acre as "a scandal." The scandals existing in connection with the administration and disposal by the U.S. Department of the Interior of Federal oil shale lands over the past 65 or more years, in my view, is truly a massive multi-billion, if not trillion dollar scandal, which seems to be too big for Congress to expose for public view and to clean up with appropriate curative legislation to be enacted into law.

Apparently, the Senate Committees possessing authority to look into oil shale claim matters and scandals need a chairman like Chairman Tom Lantos, of the House of Representatives, who with his minority counterpart, U.S. Representative Shays, have so far exposed the multi-billion dollar scandal, mess and apparent probable violations of civil and criminal law in the conduct of matters in HUD. However, one can suspect that there will be no great effort made by Senate Committees to detail or identify for the U.S. Department of Justice just what specific laws were violated and what probable crimes have been committed in carrying out the $2 billion or more HUD scandal.

It is necessary to allude to the fact that the Hearing held before Chairman Nick Joe Rahall, House Subcommittee on Mining and Natural Resources, on February 28, 1989, of the House Interior and Insular Affairs Committee, apparently will not now be printed even though I was informed some months ago by employees or staffers of said Subcommittee the February 28, 1989 Hearing would be printed.

The February 28, 1989 hearing related to H.R. 643 (101st Congress, 1st session) on oil shale. H.R. 643 as approved by the House Subcommittee on Mining and Natural Resources was apparently substituted by the House Interior and Insular Affairs Committee with H.R. 2392, passed by the House of Representatives on June 1, 1989.

H.R. 2392 is known in Colorado as "Ben Nighthorse Campbell's oil shale lands bill." Those in the "know" should know that the bill is a giveaway bill notwithstanding the "pap" put out in Colorado to make the bill look like a proper bill. H.R. 2392 should be killed by the Senate.

Until the Senate makes adequate investigations on the oil shale land scandals and holds properly prepared oil shale hearings to expose the oil shale scandals to the American people, S. 30 known in Colorado as Senator Wirth's bill, must be killed in the Senate as the bill, in my view, is an unworkable unmeritorious, improper, and an unnecessary bill designed to execute a Congressional giveaway of Federal oil shale lands or interests in said oil lands as provided for in the bill.

Just because the Interior and Justice Departments "jumped" into an improper and unnecessary giveaway of Federal oil shale lands under the August 4, 1986 Agreement, carried out in 1986 and 1987, does not mean that Congress must now permit a giveaway of its own under either H.R. 2392 or S. 30.

Congress, particularly the Senate, has its work cut out for itself, even if it does not know it -- it must expose and clean up the scandal and the giveaways under the August 4, 1986 Agreement, without further delay.

The U.S. Senate, partly under your chairmanship of the Senate Governmental Affairs Committee, must now rise to meet the challenge of exposing and cleaning up the Federal oil shale land scandals in our Federal Government or else take the risk of going down in history as a feeble Governmental institution in our Federal Government -- an institution that apparently does not have the will to properly fulfill and carry out its constitutional role with regard to Federal public domain oil shale resources. Committees in the Senate during the past 69 years, have never performed or carried out proper Investigations and Hearings on oil shale matters pertaining to alleged oil shale mining claims and related matters.

By copies of this letter to Chairman Jeff Bingaman and to Chairman J. Bennett Johnston, I request each Chairman to proceed to act on the Federal oil shale lands scandal(s) in our Federal Government without further delay in close cooperation with the U.S. Senate Committee on Governmental Affairs and to render assistance, as may be necessary, to U.S. Senate Committee on Agriculture, Nutrition and Forestry in connection with matters indirectly before that Committee pertaining to the oil shale scandal as mentioned in the July 1989 copy of clipping from Colorado Wildlife.

Enclosed with this letter is a copy of a clipping from the Denver Post, Thursday, July 13, 1989, captioned "Burford to stay with BLM." Also enclosed is a copy of a clipping from the Colorado Wildlife, July 1989, captioned "Official in oil shale scandal may run Forest Service."

The writer, Fred S. March, hereby reserves all ownership rights to this letter.

A response from each recipient of this letter is requested and the responses will be most appreciated.

Faithfully,

Fred S. March

Fred S. March

Xerox copy with enclosures to:
U.S. Senate Majority Leader, George J. Mitchell
Chairman Jeff Bingaman, U.S. Senate,
Subcommittee on Mineral Resources, Development and Production of the Senate Energy and Natural Resources Committee
Chairman Patrick J. Leahy, U.S. Senate Committee on Agriculture, Nutrition and Forestry
U.S. Senator Brock Adams
U.S. Senator Slade Gorton
Chairman J. Bennett Johnston, U.S. Senate Committee on Energy and Natural Resources

Enclosures to all are as noted in the letter to Chairman Glenn.

Temporarily at:
P.O. Box 285
Erie, Colorado 80516

Permanent at:
P.O. Box 742
Ocean Shores, WA 98569

April 6, 1989

Honorable George J. Mitchell
Majority Leader
U.S. Senate
Russell Senate Office Building SR-176
Washington, D.C. 20510

Dear Senator Mitchell:

The interests of the people of this Nation in the Federal oil shale lands in the States of Colorado, Utah and Wyoming will not be adequately protected under either S.30 or H.R. 643 (101st Congress, 1st session), if enacted into law. If pre-1920 unpatented oil shale mining claims are invalid, as I believe them to be, I submit these bills are not justifiable and are not necessary. Congress, so far, has failed to explode or expose the myth pertaining to the so-called validity of pre-1920 unpatented oil shale mining claims.

I appeal to you to take steps in the United States Senate with other Senators to open up the Federal oil shale land scandals in our Government to full public view. A full Congressional investigation aided by the GAO of the oil shale land giveaways has long been overdue. How could 430,000 acres of public land containing vast oil shale riches have been patented for $2.50 an acre on claims that have never produced oil commercially?

In my view there exists a serious breakdown in the Congress, in the Executive Branch and in the Courts on matters relating to the proper administration of law in regard to pre-1920 alleged oil shale mining claims and in regard to past disposals of oil shale lands under the guise of pre-1920 mining claims. Remedies available to the United States in regard to past erroneous giveaways of oil shale lands must be determined in Congress and in the Executive Branch before possible applicable statutes of limitations in due course may bar the United States from remedies presently available.

In light of the breakdown in Interior and Justice Departments operations on oil shale claim matters in the past years, on a massive scale in 1986 and even presently, as disclosed or touched upon in the enclosed materials identified below, I recommend that Congress take the following actions:

1. Embargo immediately further issuance of oil shale mineral patents under the U.S. Mining Law, as amended, until Congress acts to properly investigate, with the assistance of knowledgeable staff in the GAO, of oil shale claim matters from February 25, 1920, the date of the enactment of the Mineral Leasing Act of February 25, 1920, to the completion of the post-investigation Hearings by the Congress on oil shale claim matters.

   Congress must hold proper investigational Hearings after thorough staff review on oil shale claim matters along the lines of the Senate Teapot Dome Hearings held in the 20's.

   An outline for the oil shale claim Investigations and Hearings appears in S. Hrg. 100-527 at pages 191-192; also see S. Hrg. 100-744 at pages 265-290. In addition see recommendations to Congress set forth at page 15 of Statement by my brother, Michael S. March, Ph.D., referred in item A of this letter. Furthermore, see pages 14, 15, and 16 of my Statement, referred to in item B of this letter relative to enclosures.

2. Kill S. 30 and H.R. 643, (both of 101st Congress, 1st session) from being enacted into law as neither one of these bills properly faces up to matters needing attention by Congress to adequately resolve longstanding breakdown in public-land-

law administration in our Federal Government on oil shale claim matters.

These bills, as I perceive them, constitute a breakdown in Congress on oil shale claim matters. In their present form, I view them to be a form of special giveaway legislation to undercut the interests of the American people in up to 250,000 acres of Federal oil shale lands. Without bonafide Investigations and Hearings on oil shale claim matters, Congress essentially will continue the perpetuation of a climate in government to permit more oil shale land giveaways and to cover up the oil shale land scandals in our Federal Government.

If this is permitted by Congress to happen in our Government, then, in my view, Congress will have failed to properly discharge its constitutional duties and obligations to the American people in a defective legislative process in regard to pre-1920 oil shale claim matters in our Federal Government. Congress cannot properly craft legislation without developing for the record in full investigations and Hearings the facts and the law relevant to pre-1920 unpatented mining claims, their validity or invalidity, the evils to be cured by legislation, if any, the facts relevant to the nature, extent and the reasons for the improper, if not illegal and fraudulent, giveaway of the Federal oil shale lands and resources, to the detriment of the American people.

3. Expose to the American people the full facts underlying and surrounding the validity and/or known invalidity of the 524 pre-1920 oil shale mining claims, the subject matter of the August 4, 1986 Agreement (between the U.S. Government and alleged claim owners) which resulted in the disposal for $2.50 an acre of 82,000 acres of Federal oil shale lands in conformance with the terms of the Agreement to the private interests. This disposal, in my view was the product of improper operations in the Department of Interior and Justice on oil shale claim matters. In my opinion, the August 4, 1986 Agreement was and is most questionable, if not illegal or worse, and the disposal of the 82,000 acres under the Agreement also most questionable, if not illegal or worse and/or without authority of law. The Congress has not investigated that large disposal which newspapers out here called a giveaway.

4. Additional matters for Congress to pursue. Congress must not cover up this scandal by way of either S. 30 or by H.R. 643. What was the statutory authority for the August 4, 1986 Agreement, if any? Does the United States have any remedies that should be pursued by Congress and/or by the Department of Justice to recover the 82,000 acres and/or to recover the value of the lands, if illegally disposed? Who really made the decision then in our Federal Government to enter into the Agreement and what was the basis and rationale in the Interior and Justice for entering into the Agreement? Was this basis and rationale, if any, proper, sound and in compliance with law? Why was a competent draft brief prepared here in Denver questioning the legal basis for the huge disposal disregarded?

Who made the decision in said Departments in Washington, D.C., to disregard the recommendations of the Regional Solicitor's Office, Department of the Interior, Denver, Colorado (phone 1-303-236-8444) that Tosco v. Hodel be appealed? Why was Tosco v. Hodel not appealed to U.S. Circuit Court of Appeals, 10th Circuit? Who at Washington, D.C. in said Departments made a decision, if any, to disregard the content of a draft appeal brief, approximately 182 pages long, prepared by knowledgeable and experienced public land lawyers in Denver, pointing out the errors of fact and law in Federal District Court's decision in Tosco v. Hodel? Who should be held responsible for the transfer of 42 billion barrels of estimated recoverable shale oil contained in the 82,000 acres divested from Federal ownership? Why was an investigation report by staff of the House Appropriations Committee not published?

What did the patentees or beneficiaries of the 1986 Agreement receive per acre in the sale of oil shale lands patented under the Agreement? Did any of the patentees receive as much as $6,000 to $8,000 per acre, with a reservation of substantial overriding royalty in the sale of lands patented at $2.50 an acre under the Agreement?

Oil shale lands which might be disposed by the Interior Department under the guise of "valid claims," covering possibly up to 250,000 acres in the States of Colorado, Utah and Wyoming, in my view, have a strategic and national security value of importance to the people of the United States, certainly in years to come. These lands may contain possibly up to 100 billion barrels of estimated recoverable shale oil. S. 30 and H.R. 643, when revised in Congressional Committees, likely will permit alleged claimants to obtain title to oil shale and associated minerals in the oil shale deposits in the above lands. It is foreseeable that the revised bills as may be reported out of certain Committees will, in effect, validate certain oil shale claims for purposes of these bills, if enacted into law. Why should the Congress consider such "giveaway" bills?

The pending oil shale legislative proposals would involve huge immediate "gifts" to the claimants -- who will ultimately sell to the oil companies. H.R. 643 and S. 30 propose to grandfather for disposal at $2.50 an acre an estimated 12,000 acres. At a minimal $2,000 an acre for these rich mineral rights this would be a immediate handout of $24 million. Governor Roy Romer of Colorado has proposed that 50,000 acres be grandfathered -- a proposed "gift" of $100 million at least. Lengthy Interior Department briefs I have seen raised serious questions about the validity of pre-1920 oil shale claims. What is the justification for these huge proposed gifts? See the Statement by Dr. Michael S. March summarizing the history of oil shale disposals, referred to in item A, below.

The Department of Interior apparently is unable or unwilling to properly administer laws applicable to Federal oil shale lands. Appropriate Senate Hearings can cause the Secretary of the Interior to get a better understanding of the breakdown in Interior on oil shale claim matters and can cause the Secretary to take steps to clean up operations in the Interior Department on oil shale mining claims.

The Federal shale lands in the States of Colorado, Utah and Wyoming should not be made the subject matter of a so-called political compromise to suit alleged unpatented oil shale mining claim owners, certain environmental organizations, local and State officials and certain private individuals as well as elected members of Congress from the States of Colorado, Utah and Wyoming, to the vast detriment of the people of the United States and our Federal Government. The issues underlying the potential grab and/or disposal of up to 250,000 acres of Federal oil shale lands constitute a national matter which must receive the informed input of the entire Congress rather than so-called "compromises" in disregard of the public interest by a handful of local and State officials and a few members of the United States Congress and certain private interests.

Enclosed are the following self-explanatory materials:

A. Letter dated February 25, 1989, together with statement by Michael S. March, Ph.D., supplied for the House Subcommittee hearing held on February 28, 1989.

B. Letter dated February 27, 1989, with my statement, supplied to Chairman Nick

Joe Rahall for the record of the February 28, 1989 hearing held by the House Subcommittee on Mining and Natural Resources.

C. Letter by Daniel F. Lynch, Esq., (phone 303-831-6012), dated March 6, 1989, together with letter dated February 27, 1989, both to Chairman Rahall.

D. Clipping from the Boulder, Colorado Daily Camera, Saturday, April 3, 1989, page 14A, reflecting a column by Mr. James J. Kilpatrick of Universal Press, entitled "New land grab in the West." (Note: The GAO report, largely the basis of the column, is deficient in that the report does not address or answer the question whether the claims, the matter of the report and column, were valid at the date or dates of issuance of the patents and/or when applied for. Apparently, Chairman Nick Joe Rahall of the House Mining and Natural Resources Subcommittee, never requested the GAO to determine, whether as a fact, the claims patented fully met the requirements of the U.S. Mining Law, as amended. In other words, GAO in its report never addressed the issue of whether Interior in the past and is now properly administering and enforcing the Mining Law to assure that invalid claims not be patented by the Bureau of Land Management. GAO should be requested by Congress to make a definitive examination to determine whether BLM has wrongfully issued mineral patents in violation of law.)

I respectfully request a response from you on this letter and on the content of the enclosures. You may quote from this letter and the enclosures into the Congressional Record. Please feel free to contact me if you have any questions.

The writer, Fred S. March, hereby reserves all ownership rights to this letter.

Faithfully,

Fred S. March

Fred S. March

Xerox copy with enclosures to:
Chairman, Senate Democratic Policy Committee, U.S. Senate, The Capitol, S118, Washington, D.C. 20510

Honorable John Glenn, Chairman, Senate Committee on Governmental Affairs, Hart Office Building, SH503
U.S. Senate
Washington, D.C. 20510

Temporarily at
P.O. Box 285
Erie, Colorado 80516

Permanent at
P.O. Box 742
Ocean Shores, WA 98569

Page 12 Rocky Mountain News Tuesday, August 1, 1989

State/Region

Armstrong vows death of Wirth's shale bill

By KAREN MacPHERSON
Rocky Mountain News Washington Bureau

WASHINGTON — Sen. William Armstrong, R-Colo., yesterday vowed that oil shale legislation sponsored by his Democratic colleague, Sen. Tim Wirth, will pass Congress "over my dead body."

But Wirth contended that his legislation is needed to avoid a repeat of a 1986 settlement of Colorado oil shale lands, which he called a "firesale" and compared it to the misuse of public funds now being uncovered at the U.S. Department of Housing and Urban Development.

The debate between Armstrong and Wirth revolves around the "patenting" of oil-shale claims, a process that transfers ownership of land claimed under the 1872 Mining Law from the federal government to the claim holder.

Currently, there are 1,600 oil shale claims, covering 253,685 acres in Colorado, Wyoming and Utah.

At a Senate hearing on the legislation — chaired by Wirth — Armstrong told his Senate colleague: "I just completely disagree with the reasoning, as well as the probable effect, of the legislation.

"The bill starts with the assumption . . . that somehow we're giving away federal lands. . . . We're not talking about selling lands, we're talking about registering an ownership that already exists."

In an interview later, Armstrong added: "There are some things I'm not flexible about. They're talking about taking away something somebody owns."

Wirth, however, contended that the 1986 Interior Department settlement of about 82,000 acres of oil shale lands at $2.50 an acre was a "scandal."

Many of the lands in the 1986 settlement were later sold for $2,000 an acre, Wirth noted.

Wirth's legislation would prohibit the Interior Department from issuing any new patents for oil shale claims unless an application had been filed and all requirements met by Jan. 25, 1989.

The measure also requires oil shale claimholders to choose between holding the claim or converting it to a mineral lease. The claimholders would have to develop the oil shale within 10 years, or lose the claims.

The claimholders also would be required to do $1,000 worth of work each year on their claims, 10 times more than the current $100 requirement.

The House passed oil-shale legislation in June that represented some of the work done by a Colorado task force trying to forge a compromise among oil shale claimholders, environmentalists, northwestern Colorado county officials and state natural resource officials.

Unlike the Wirth bill, that bill would differentiate among three types of claimholders. It also would require them to do $5,000 worth of work each year on their claims, compared to $1,000 in the Wirth bill.

THE DENVER POST Thursday, July 13, 1989

Burford to stay with BLM

Ex-bureau chief to be special aide, troubleshooter

By Peter G. Chronis
Denver Post Staff Writer

Former Bureau of Land Management Director Bob Burford will stay with the agency as a Denver-based special assistant and troubleshooter for his successor.

Burford, a Western Slope rancher and Colorado House speaker before taking the helm of the BLM under then-Interior Secretary James Watt in 1981, will handle issues in the Western states for the agency, BLM Director Cy Jamison has announced.

"What better salesman do we have than Bob Burford?" Jamison said. "He relates well to the user groups out there. We'll use him wherever we can."

Burford, 65, learned in April he was to be replaced by Jamison, 40, who was sworn in June 29. Burford had served as BLM chief for eight years — longer than any other agency director in history.

Burford

The Colorado rancher was one of several Colorado Republicans given high-level appointments when President Reagan took office in 1981. Burford had wanted to continue as BLM chief, but President Bush appointed Jamison to the post. Jamison previously was a member of the House Interior Committee staff.

Ann Gorsuch Burford, Burford's wife, had a stormy tenure as director of the Environmental Protection Agency and ultimately was forced out of the post.

Burford himself kept a relatively low profile. However, some of his bureau's decisions concerning oil shale claims and grazing fees for ranchers using public lands brought some criticism.

Since taking office, Jamison appears to be taking a more conciliatory approach toward environmental groups, who clashed with Burford and accused him of favoring ranching and energy interests. Jamison has promised to "address environmental protests quickly and thoroughly" to avoid later problems.

"I think it's safe to say that if environmentalists have a specific problem in a specific area, we will want to sit down and work with them," he said.

Attempts to reach Burford were unsuccessful late yesterday.

COLORADO
WILDLIFE

Volume 7, Issue 6

Jul 1989

Official in oil shale scandal may run Forest Se vice

To the horror of environmentalists, James Cason, an Interior Department official responsible for the controversial 1986 transfer of 82,000 acres of oil-shale-rich federal lands in Colorado for $2.50 an acre, could soon be placed in charge of the National Forest Service.

President Bush has nominated Cason to be Assistant Secretary of Agriculture for Special Services with responsibilities for the Forest Service and the Soil Conservation Service.

On behalf of the Interior Department, Cason signed the infamous 1986 Tosco settlement which resulted in the transfer of Colorado lands containing an estimated 42 billion barrels of recoverable oil shale. According to some estimates, the transfer could cost the United States a loss of $210 billion in foregone royalties if oil shale on the lands is ever developed.

Before President Reagan left office last year, Cason, undeterred by the public outrage over the 1986 transfer, publically proposed new oil shale standards that would likely have resulted in the transfer of an additional 250,000 acres of federal oil shale lands in Colorado, Wyoming and Utah.

Nationally, a number of environmental groups, including the National Wildlife Federation, have expressed their vehement opposition to Cason's nomination. Besides Cason's involvement in the oil shale scandal, environmentalists also claim that Cason:

—improperly pressured the Fish and Wildlife Service not to list the northern spotted owl as an endangered species.

—ordered drafts of a Bureau of Land Management report on the status of the spotted owl to be destroyed. The report suggested that endangered species listing for the owl was a possibility if current logging practices continued.

—authorized the infamous "mining in the parks" rule that weakened protections against strip mining in National Parks and other lands of national interest.

—was responsible for the mismanagement of the Office of Surface Mining's permit progr m, wasting millions of taxpayer dolla :

CWF member interested in commenting on Casc 's nomination can write to the follo ing senators on the Agriculture Comr ittee: Patrick J. Leahy of Vermont, D vid H. Pryor of Arkansas, David L. oren of Oklahoma, Howell Heflin of labama, Tom Harkin of Iowa, Kent onrad of North Dakota, Wyche Fow r of Georgia, Tom Daschle of South akota, Max Baucus of Montana and Bob Kerrey of Nebraska.

Mail to the com nittee may be sent to Senate Russell O ice Building, Room 328A, Washingto , D.C. 20510.

Editorial: Please submit double-spaced typewritten manuscripts and include self-addressed stamped envelope for return of materials. Address unsolicited editorial to Paul Zaeg, CWF Editor, 1560 Broadway, Suite 700, Denver, CO 80202.

Sierra Club
Rocky Mountain Chapter

"...TO EXPLORE, ENJOY AND PRESERVE THE NATION'S
FORESTS, WATERS, WILDLIFE AND WILDERNESS..."

Certified Mail -- Return Receipt Requested

The Honorable J. Bennett Johnston, Chairman
Senate Committee on Energy and Natural Resources
Senate Office Building
Washington, DC 20510
August 25, 1987

Dear Chairman Johnston:

The Rocky Mountain Chapter of the Sierra Club has 7000+ members in the State of Colorado, most of whom have a keen interest in the management of Federal public lands in Colorado. On behalf of that organization, I would like to express some concerns to you about the handling by Congress of legal and policy matters pertaining to pre-1920 unpatented association oil shale mining claims. In particular, we are concerned about the action taken by the Senate on May 27, 1987, on the Melcher-Wirth modified amendment (hereafter "May 27th amendment"), and the actions taken by the House on May 28, 1987, and June 2, 1987, in passing H.R. 1039 as reported by the House Interior and Insular Affairs Committee (hereafter "HIIAC").

MELCHER-WIRTH MODIFIED AMENDMENT

As you may recall, the original Melcher-Wirth amendment 222 to the FY '87 Supplemental Appropriations Bill excepted from the embargo amendment patent applications #C-012327 and #C-016671. These two patent applications involved some of the claims that as of May 27, 1987, remained unpatented though said claims were the subject matter of the August 4, 1986, Agreement (hereafter "Agreement") between the Departments of Interior and Justice (DOI and DOJ, respectively), and the oil shale claimants. The Melcher-Wirth amendment 222 to H.R. 1827 was modified prior to passage by the Senate on May 27, 1987, to add patent applications #'s C-023661, C-41836, C-43354, C-39464, C-38579, C-38402, C-35080, and C-36293 as further exceptions to the embargo amendment. These eight patent applications involve approximately 11,000 acres of oil shale lands in Colorado, and if permitted to go to patent, will entail substantial future royalty losses to the U.S., half of which would be sustained by Colorado.

The Melcher-Wirth modified amendment reads as follows:

2239 E. Colfax Avenue, Denver, CO 80206 303 / 321-8292

> None of the funds in this or any other Act shall be available prior to March 31, 1988, to issue a patent for an oil shale mining claim located prior to enactment of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 181, et seq., 41 Stat. 437) as provided for under the General Mining Law of 1872, as amended (30 U.S.C. Sec. 22, et seq., 17 Stat. 91) except for patent applications C-012327, C-016671, C-023661, C-41836, C-43354, C-39464, C-38579, C-38402, C-35080, C-36293.

We understand that the Melcher-Wirth modified amendment 222 survived the actions taken by the conferees on H.R. 1827 and is now reflected in Public Law 100-71, approved by the President on July 11, 1987.

We believe that the addition of the first two patent applications (#C-012327 and #C-016671) as exceptions raises the question whether the Senators voting for the May 27th amendment knew that such action now might be construed by a court or courts as having validated or legalized the Agreement and disposals thereunder. If the May 27th amendment, upon enactment into law, were to have this legal effect, then it could be said that the Senators voting for it validated the Agreement and its disposals, and were also instrumental in opening the door for the DOI to issue patents on the claims covering 11,000 acres.

The seriousness of this matter is highlighted in the enclosed press clippings, one from the Rocky Mountain News of July 17, 1987, headed "Oil Shale Move May Cost U.S. $210 Billion", one from the Boulder Daily Camera of July 17, 1987 (an Associated Press story), headed "Giving Away Shale Land to Cost Billions, Report Says", and one from the Rocky Mountain News of July 22, 1987, headed "Critics of Shale Ruling Rile Landowners." ("Landowners" meaning the recent patentees of oil shale lands.) All these articles refer to the Agreement and the disposal of 82,000 acres of oil shale land accomplished by it, all of which have now been patented.

We believe that the August 12, 1986, oversight hearing relating to certain narrow issues pertaining to the August 4, 1986, Agreement held before Chairman Udall and his HIIAC, and the September 11, 1986, hearing on H.R. 5399, 99th Cong., 2nd Sess., before Chairman Rahall's Subcommittee on Mining and Natural Resources of HIIAC were not adequate to expose what we regard as the scandal of the Agreement and disposals thereunder and the mishandling of oil shale land matters by the Interior and Justice Departments. In fact, it is hard for ordinary citizens such as ourselves to avoid the conclusion that these hearings operated more to cover up the oil shale claims scandal rather than to develop facts for the record as to the whys and wherefores of the scandal. In fact, certain crucial people from the Interior and the Justice Departments who have been involved in oil shale matters for many years have not yet testified regarding the matters pertaining to pre-1920 oil shale mining claims and the Agreement--thus, the input of such people on how to settle certain oil shale issues has not been obtained. One further basis for our suspicions is the failure of the HIIAC to publish and make available to the public the hearing records. Certainly, when tens or even hundreds of billions of dollars worth of public resources are involved, and when those resources are disposed of by perverting both the U.S. mining laws and the Mineral Leasing Act of 1920, it would seem prudent and, certainly cost effective, to publish the above hearing records for posterity if nothing else.

We submit that it is imprudent for Congress not to obtain the views of three knowledgeable and experienced career lawyers in the Regional Solicitor's Office, DOI, Denver, who have an extensive knowledge of oil shale claim matters.

We call to your attention that there exists a credible critique of the Agreement with an excellent analysis of pre-1920 claim matters in the context of Oil Shale Lands Bill, H.R. 1039, 100th Cong., 1st Sess., introduced on February 5, 1987, by Mr. Rahall for himself, Mr. Udall, Mr. Vento and Mr. Campbell, which is set forth on pp. 137-153, in the Appendix to the Oil Shale Claims Hearing on H.R. 1039 before the Subcommittee on Mining and Natural Resources, HIIAC, March 3, 1987, Serial #100-1. We incorporate this Appendix (a copy of which is enclosed for your ready reference) in these comments by reference, and we also enclose a copy of another memo written by Mr. Fred S. March, dated May 26, 1987, and titled Oil Shale Claims Mess in Our Federal Government. We understand that Mr. March's memo of May 26, 1987, was sent to Chairman Udall and Subcommittee Chairman Rahall of HIIAC and to Senators Melcher and Wirth and you, and to some other members of Congress, some of whom will also be sent a copy of this letter. We urge you and your Committee staff to examine carefully Mr. March's critiques in the May 26, 1987, memo and the Appendix above noted before responding to this letter and before deciding upon a strategy as to how to handle oil shale claim matters in the Senate, particularly as to what the Senate should do on H.R. 1039 which we assume is now before the Senate. We believe that Mr. March's critiques have brought to the attention of Congress very important information and insight which so far the HIIAC appears to have largely neglected in formulating H.R. 1039 as reported out of HIIAC and as passed by the House on June 2, 1987. This information and insight should not be neglected by your Committee in further proceedings on oil shale matters.

Questions Requiring Answers

The major point of this letter is to request respectfully the answers to several questions that we have concerning oil shale claims matters in the Senate. Why has the Senate and its Committees failed (or chosen not) to investigate the following topics?

1) The validity or invalidity of the 525 claims covered by the Agreement, as well as other unpatented oil shale claims involved in pending patent applications.

2) The correctness of the decision in TOSCO v. Hodel (611 Federal Supplement 1130, USDC Colorado, May 1, 1985), a decision known to be erroneous both as to the facts and the law, as exposed by the draft legal brief prepared by attorneys in the Denver Regional Solicitors Office for DOI. A copy of this brief, probably in excess of 150 pages, was supplied to Chairman Udall for the September 1986 HIIAC hearings.

3) The correctness of the decision in the landmark case of Freeman v. Summers (52 L.D. 201, 1927), which decision was exposed as erroneous in the 1968 DOI legal brief filed in Contests 359 (U.S. v. Winegar et al.) and 360 (U.S. v. D. A. Shale Co., Inc.). A copy of this brief should be in the possession of the National Parks and Public Lands Subcommittee of HIIAC. A further expose of the deficiencies of Freeman v. Summers appeared in a lengthy post-hearing brief dated March 12, 1982, and the post-hearing reply brief dated March 26, 1982, both filed by Denver Regional DOI lawyers in the case of U.S. v. Weber Oil Co. et al. in Contests 193, 260, and others. These post-hearing briefs also shed light on defects of some 200 claims, which later, along with other claims, became the subject of the Agreement.

4) The correctness of decision in Andrus v. Shell Oil Co. (446 U.S. 657, 1980), particularly in light of the facts and law set out in the Contest 359 and 360 briefs cited above. The Supreme Court apparently failed to perceive the nature of the charges used to contest the claims. The Denver Regional Solicitor's Office recommended that a petition for rehearing be filed in this case, but the Interior and Justice Departments failed to do so at the Washington level. We recommend that your Committee investigate and open this matter up for full public view so the American people will get a better idea of how their multi-billion-dollar interests in the public domain oil shale lands are foreclosed by the Interior and Justice Departments for the unjust

enrichment of the few and impoverishment of the many. Mr. William Shafer, an HIIAC staff consultant, has copies of the Government's briefs in U.S. v. Weber Oil et al., which are also relevant as to the proper application of Andrus.

Those members of the Senate speaking on oil shale claims matters on the Senate floor on May 27, 1987, appeared not to be familiar with the contents of the above-mentioned briefs, and so it seems to us that these Senators did not really make a well-informed presentation of the problem. Consequently, their colleagues in the Senate were not adequately educated about the problems the Federal Government had and still has with oil shale mining claims. We believe that the contents of these above-mentioned briefs would be of great interest to any Senator who has a concern about the proper or improper disposal of public domain oil shale lands.

5) The legality or validity of the Agreement itself. This seems imperative to us, given the following considerations:
    a). Facts and circumstances pointing to the invalidity of the claims, as outlined in the documents cited above.
    b). The existence of the question of whether either the DOI or the Dept. of Justice (DOJ) had the authority under either the 1872 Mining Law or the Mineral Leasing Act of 1920 to enter into the Agreement: no such authority was cited in the Agreement. What is the statutory authority, if any, for the Agreement?
    c). The fact that persons or entities having vested rights under other public land laws in conflict with the claims of the mining claimants were not given the opportunity to protest the then contemplated actions of the Government prior to its entering into the Agreement.
    d). The fact that the Secretary of the Interior abdicated his responsibility under the law to complete all appeals to determine the validity or invalidity of the then pending claims. Important legal precedents and teachings on this subject may be found in Knight v. U.S. Land Association, 142 U.S. 161, 177-182; West v. Standard Oil Co., 278 U.S. 200; Cameron v. United States, 252 U.S. 250 (1920); and Standard Oil of California v. United States, 107 F. 2d 402 (1940).

6) Why the DOI and DOJ did not process to the U.S. Circuit Court of Appeals, 10th Circuit, bona fide appeals to TOSCO v. Hodel and related cases. The significance of this question derives from questions 1-5 above, as well as the multi-billion-dollar potential losses to the United States if oil shale is developed on patented mining claims.

7) What appears to us to be the gross mismanagement, if not possible outright fraud which has not yet been investigated, in the operations of the DOI and DOJ in their disposal of oil shale lands contrary to the intent of Congress in the 1872 Mining Law and the Mineral Leasing Act of 1920. It is shocking to know that the Interior and Justice Departments permitted the U.S. Government to be held hostage by way of an erroneous decision--TOSCO v. Hodel--in the manner as to extort from the people of the United States 82,000 acres of oil shale lands under the terms of the Agreement. In consideration for the Agreement the Government received a weak commitment to get TOSCO v. Hodel vacated after the issuance of the patents to 82,000 acres of oil shale lands with the Government being reconveyed the oil and gas and coal in these lands when, in fact, bona fide appeals should have been perfected by the Interior and Justice Departments to TOCSO v. Hodel and related cases to the U.S. Circuit Court of Appeals 10th Circuit. The benefits which the Government received under the Agreement were insignificant compared to the potential royalty loss from these oil shale lands. On its face the entire transaction pertaining to the Agreement and the disposals of oil shale lands thereunder represents improper administration of the U.S. laws.

It should be noted here that insofar as known to us, no member of Congress in any hearing held so far has attempted to refute the misleading propaganda in support of the Agreement put out either orally or in writing by Interior spokesmen. Thus it appears that the Congress as a whole has assented to the erroneous statements put out by one or more Interior officials in support of the Agreement. We recommend that you and your Committee expose the Agreement for what it really is and in doing so complete the job that Chairman Udall of HIIAC undertook on August 12, 1986, in his oversight hearing relating to the Agreement, but apparently has seen fit not to complete. For example, to get a further sense of the breakdown in the Federal Government on oil shale matters (especially in the Interior Department, the Budget Bureau, and White House) in the period 1961-1964, see the various depositions, interrogatories, and exhibits obtained or submitted in the case U.S. v. Mobil Oil and Equity Oil, Civil Action #4135 USDC, Colorado, a case involving an erroneously issued patent, which case was compromised by the Government favorably to the defendant oil companies in 1977 or thereabouts. Also see, U.S. v. Eaton Shale Co., 433 F. Supp. 1256 (1977) which refers to certain exhibits from the above case.

8) The adequacy and propriety of the content of Solicitor Ralph W. Tarr's letter of April 17, 1986, to Assistant Attorney General Habicht, II, recommending settlement of the TOSCO v. Hodel and related cases. Did Solicitor Tarr properly explain what was involved in the proposed settlement, i.e. did he misrepresent the effect of certain cases cited in his letter, especially in light of the facts and the law reviewed as to some 200 claims in the Government's briefs in the administrative hearings in the case of U.S. v. Weber Oil et al.? Did Solicitor Tarr adequately discuss the foreseeable impact on the United States Government of entering into the Agreement, and the subsequent pressures that would be generated on DOI and Congress to continue with further giveaways of oil shale lands, under the guise of claims which were not part of the Agreement?

9) The appropriateness of the issuance by Judge Finesilver of two Orders on or about November 19, 1985, to make TOSCO v. Hodel applicable to two large batches of claims involved in U.S. v. Energy Resources et al., and in U.S. v. Weber Oil Co. et al., which involved different fact situations and different charges by Interior than the claims which had specifically been litigated before the Judge in TOSCO v. Hodel. For instance, it should be noted that at least one of the contests, namely Contest 260, consolidated into U.S. v. Weber Oil Co. et al., for hearing involved the issue of fraud in the location of claims, a charge not involved in the administrative contests on the claims that were specifically subject to the holding in the TOSCO v. Hodel decision. In Contest 260, U.S. v. E.R.T.L., Inc., we believe the Interior Board of Land Appeals sustained the charge of fraud in location on some of the claims.

10) The propriety of the Justice Department entering into a stipulation to make the batch of claims in U. S. v. Theo Ertl, et al., subject to the then proposed Agreement even before the Interior Board of Land Appeals had issued a decision on the appeal to the Board on said claims.

11) Finally, whether the Melcher-Wirth modified amendment, as enacted into law, validated or legalized the August 4, 1986, Agreement and the disposal of 82,000 acres of oil shale lands under the terms of the Agreement.

SOME ADDITIONAL REQUESTS

We would like to know whether your Committee or any of its Subcommittees will hold hearings on the oil shale claim matters. In particular, if hearings will be held, what factual and legal issues will be covered in them? Will it be possible for hearing participants to address the Agreement itself and the disposals thereunder? Additionally, we request that you and/or the appropriate Subcommittee chairman determine, by way of a Comptroller General's opinion, whether there may be a fraud upon the U.S. Government being perpetrated by those in the Executive Branch who appear to be willing to use TOSCO v. Hodel (a known erroneous decision), whether vacated or not,as a basis to justify further issuance of oil shale patents, and in actually issuing further patents. We commend to your attention the case of Standard Oil Co. of California v. the United States (1940), since the dictum in the decision in this case may be relevant to the fraud issue.

We do not understand why the DOI Secretary's top staff disregarded the advice of the Department's legal experts in Denver that TOSCO v. Hodel be appealed. Why did the Secretary of Interior or his top aides not request a full briefing on the draft brief prepared in Denver on the errors of law and fact in the TOSCO v. Hodel decision? How could the Department enter into the Agreement in 1986 without making a full economic study of the values which would be divested from public ownership? We strongly urge your Committee to request the Comptroller General to have his professional staff make a thorough investigation and evaluation of the adequacy of the charges used by DOI in all the administrative contests involving the 525 claims covered by the Agreement and especially the contests leading to TOSCO v. Hodel. This should include the sufficiency of preparation for contests and appeal proceedings and for DOJ litigation of this case in the Courts to assure that any disposals of oil shale lands were strictly in accord with U.S. laws. The GAO review should also include a full step-by-step audit of how the 1986 Agreement with the claimants was negotiated together with an evaluation of the adequacy or inadequacy of DOI and DOJ efforts to protect the public stake in the oil shale lands to be divested under the Agreement. Also, the GAO should ascertain whether there exists any statutory authority to authorize this Agreement. Was this Agreement ordered by the Secretary or his representatives or by someone elsewhere in the Executive Branch in disregard of the massive legal and factual information about the defects of these claims and whether each of them met the criteria for patenting under U.S. laws?

Congress should take notice of the fact that a giveaway of oil shale lands, such as under the August 4, 1986, Agreement, leads to pressures for further giveaways and/or special protection for pre-1920 claimants or their successors in interest, such as evidenced in part by the legislation enacted into law in the form of the Melcher-Wirth modified amendment. Accordingly, it is foreseeable that in connection with H.R. 1039 there will be a great effort made in the Senate to make H.R. 1039 a real and sweeping giveaway bill by enlarging the giveaways already proposed under the bill. We hope that you and the other Committee members of your Committee will resist such efforts, particularly in light of all the legislative history and the information therein developed applicable to the provisions contained in the Mineral Leasing Act of February 25, 1920 (especially in the Senate debates).

We hope that we are not being ovarly concerned or unreasonable in making the foregoing requests. Whether the Agreement and the disposals thereunder are seen eventually as a relatively minor scandal involving the disposal of the surface of the lands with oil shale deposits that may never be developed, or as a scandal of historic proportions involving loss of hundreds of billions of dollars of potential income to the United States, will depend on the extent to which oil shale production becomes economically viable. Since it seems likely to us that the latter will be the case at some point, we strongly urge Congress to give attention to the above questions, and not allow hundreds of thousands of acres of oil shale land to be taken from the public domain improperly without a fight. In any event, the Agreement should not have been entered into. Remedies available to the United States, if any, relating to the Agreement and the disposals thereunder should definitely be explored by you and your Committee.

In view of the above analysis and questions, the Melcher-Wirth modified amendment 222 (see page S-7182, May 27, 1987, Congressional Record) to H.R. 1827, the Supplemental Appropriations bill for fiscal 1987, fails to serve a public purpose properly. It was not based on adequate factfinding and public hearings. The exception for the 10 then pending patent applications has converted the amendment into a special interest handout absent a proper investigation of oil shale claim problems by the Committee. The amendment might have the effect of giving a semblance of legitimacy to the questionable 1986 Agreement and the huge disposals of oil shale lands thereunder. Moreover, the short period for the embargo to March 31, 1988, will not permit sufficient time for the Congress to investigate properly the legitimacy of prior disposals and of outstanding oil shale claims, the correctness of TOSCO v. Hodel, and the obvious mishandling by Interior of oil shale claims over the years. To protect the public interest, the Congress must conduct a thorough investigation of this longstanding, complex matter by qualified and experienced investigative staff, preferably with the professional assistance of the General Accounting Office.

It was most unfortunate that the Conference Committee on H.R. 1827 did not eliminate the exception for the 10 then pending applications for patents from the May 27 amendment. This exception simply continues the process of giving away valuable oil shale lands without proper investigation and review of the oil shale claims filed before February 25, 1920, the date of the enactment of the Mineral Leasing Act of 1920.

Thank you for your consideration of these opinions and for your response to our questions. Should hearings on this matter be held by your Committee or its Subcommittees, please make this letter and its enclosures a part of the hearing record. Also, please inform us well in advance when and where any hearings are to be held.

Sincerely,

Douglas M. Robotham

Douglas Robotham
Chapter Staff Person
Sierra Club, Rocky Mountain Chapter
2239 E. Colfax Ave.
Denver, CO 80206

Copy with enclosures to:
- Senators Wirth, Melcher, Metzenbaum, and Majority Leader Byrd
- Representatives Skaggs, Campbell, Rahall, Udall, Yates, Whitten, and Speaker of the House Jim Wright
- Comptroller General Charles A. Bowsher
- Mr. James Miller, Director, OMB